2011

University of Cape Town
School for Advanced Legal Studies
Department of Commercial Law

Name: Janine Hofmann Häberli
Student No: HFMJAN007
Word Count: 23'038 (excl. footnotes)
Contact No.: 0041 78 764 18 38
Email: jhofmann@ente.limmat
Supervisor: Professor Alain Rycroft

"Anti-Suit Injunctions in International Commercial Arbitration in the Light of the *West Tankers* Decision"

Table of content

I. Introduction

This dissertation will evaluate anti-suit injunctions as a procedural remedy in international commercial arbitration before and after the *West Tankers* decision.[1]

The anti-suit injunction was originally developed in the English legal system. In the past, it was mainly used in equity law to intervene in common law court litigation and preclude vexatious and oppressive litigation or a multitude of lawsuits.[2] Today, anti-suit injunctions, in the context of arbitration, are used to restrain a party from beginning or continuing court proceedings when they agreed to arbitrate the matter in case of a dispute.

The *West Tankers* decision was given by the European Court of Justice (thereafter "ECJ") in February 2009. It related to the anti-suit injunction issued by an English court in order to prevent one of the disputing parties from continuing court proceedings in Italy, in favour of the parties' arbitration agreement.[3] The use of anti-suit injunctions by English courts in favour of an exclusive jurisdiction clause has evoked disputed questions of their compatibility with European procedural law. Since England is part of the European Union (thereafter "EU"), it has to comply with European rules and regulations which prevail national legislation. In this decision, the ECJ, specifically analysed the compatibility of anti-suit injunctions and the European rules and regulations on jurisdiction and enforcement of judgments. Thus this dissertation will mainly focus on the English and European jurisdiction and legislation. Furthermore, the author will examine if and to what extent the *West Tankers* decision has had an impact on arbitration in Switzerland, which is not part of the EU, but which is also bound by treaties on jurisdiction and enforcement of judgments, as well as on arbitration proceedings outside the EU.

---

[1] *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* (C-185/07) [2009] ECR I-663 (thereafter "*West Tankers* decision").
[2] See below s III/2/2.1.
[3] See below s IV/1/1.7.

In the first part, the meaning of international commercial arbitration, for the purpose of this dissertation, will be explained followed by a general overview of the anti-suit injunction, its origins and its prerequisites today. Thereafter, the *West Tankers* decision will be outlined and critically assessed in light of policy and legal considerations and its impact on arbitration within the EU and Switzerland, as well as outside Europe, will be considered.

Finally, the author will draw a conclusion regarding the *West Tankers* decision and its meaning for arbitration proceedings.

II. Characteristics of International Commercial Arbitration

1. INTERNATIONAL ARBITRATION

1.1. No Uniform Notion of International Arbitration

In arbitration practice, one usually draws a distinction between domestic and international arbitration.[4] As opposed to purely domestic arbitration, international arbitration involves elements which provide for a cross-border reference in some respects.[5] These elements often differ from country to country or are weighted differently. However, there is no universally valid agreement on the notion of international arbitration.[6]

There are mainly two approaches to international arbitration.[7] Either the focus is primarily on the parties involved, meaning that they have different nationalities, domiciles or places of business, or else the focus is on the dispute itself, meaning that it is of an international nature.[8] The nature of the dispute aligns itself with the underlying transaction, which must comprise of the shift of goods, services or funds across national boundaries in order to qualify as international.[9] Some countries or arbitration organiza-

---

[4] Girsberger D Voser N *International arbitration in Switzerland* (2008) 7.
[5] Girsberger D Voser N op cit 22.
[6] Blackaby N et al *Redfern and Hunter on International Arbitration* 5ed (2009) para 1.22.
[7] Girsberger D Voser N op cit 23.
[8] Blackaby N et al op cit para 1.23 et seqs.
[9] Girsberger D Voser N op cit 23.

tions use only one of these criteria, others use them combined to define whether arbitration is international or not.[10]

1.2. The Approach of the Uncitral Model Law

The Uncitral Model Law on International Commercial Arbitration has a broad understanding of the international character of arbitration, as both criteria mentioned above provide for internationality, but only one of them needs be given.[11] Accordingly, arbitration is international if the parties of an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different countries.[12] Furthermore, internationality is given when there is a place of arbitration, a place where a substantial part of the obligations of the commercial relationship is to be performed or a place with which the subject-matter of the dispute is most closely connected, is situated outside the state in which the parties have their places of business.[13]

The parties even have the possibility to expressly agree that the subject-matter of the arbitration agreement relates to more than one country.[14]

1.3. The Approach of England and Wales

England and Wales do not distinguish between domestic or international arbitration. The Arbitration Act equally applies to both kinds of arbitration.[15]

Nevertheless, contained within its Part II, the Arbitration Act modifies the wording of certain articles designed for international arbitration in order to adapt it to domestic arbitration. For this purpose, the Arbitration Act states that a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is either an individual who is a national of, or habitually resident in, a state other than the United Kingdom, nor a body corpo-

---

[10] Blackaby N et al op cit para 1.22.
[11] Girsberger D Voser N op cit 24.
[12] Uncitral Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (thereafter "Uncitral Model Law") art 1(3)(a). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last accessed 15 June 2011)
[13] Uncitral Model Law op cit art 1(3)(b).
[14] Uncitral Model Law op cit art 1(3)(c).
[15] English Arbitration Act, 1996. Available at http://www.legislation.gov.uk/ukpga/1996/23/contents (last accessed 18 July 2011).

rate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom.[16] Additionally, the Arbitration Act requires that the arbitration agreement, if any, determines the United Kingdom to be the seat of arbitration.[17]

Even if the English Arbitration Act is applicable to both sorts of arbitration, any country which is a signatory state of the New York Convention[18] is compelled to recognise this differentiation when it comes to the recognition and enforcement of an arbitral award. According to that Convention, an arbitral award needs to be 'foreign' otherwise it is not applicable. "Foreign" in the terminology of the New York Convention, as opposed to "domestic" as used in many national legislation and described herein above.

1.4. Switzerland's Approach

Switzerland chose to lay the focus mainly on the parties. According to art 176 of the SPILA[19], the arbitration is international if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual place of residence in Switzerland.[20] Contrary to the Uncitral Model Law, the nature of the transaction does not play a role. The distinction between national and international arbitration is important as the SPILA does only apply to international arbitration, whereas any Swiss domestic arbitration is generally subject to the Civil Procedure Act[21], a complete different set of rules.[22]

In addition, as per 1 January 2011, the parties have the choice to agree on the application of the relevant chapter of the Civil Procedure Act even if the arbitration qualifies as international as defined by the SPILA. So in general,

---

[16] English Arbitration Act op cit s 85.
[17] Ibid.
[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 United Nations Treaty Series Volume 330 p 3 (thereafter "New York Convention"). Available at http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXII-1&chapter=22&lang=en#Participants (accessed 4 March 2011).
[19] Swiss Federal Act on Private International Law, 1987 SR 291. Available at http://www.admin.ch/ch/d/sr/c291.html (last accessed 18 July 2011).
[20] Swiss Federal Act on Private International Law op cit art 176.
[21] Swiss Federal Act of Civil Procedure, 2008 SR 272 s 3. Available at www.admin.ch/ch/d/ff/2009/21.pdf (last accessed 18 July 2011).
[22] Girsberger D Voser N op cit 23.

if both parties have either their habitual place of residence or their domicile in Switzerland, the arbitration is not considered international and the SPILA is not applicable.

2. DEFINITION OF COMMERCIAL

The notion of commercial is less controversial. It indicates that the dispute between the parties relates to any kind of business matter, in contrast to other fields of law such as inheritance law.[23] It is generally agreed that the term 'commercial' should be given a wide interpretation so as to cover all aspects of international business, be it contractual or non-contractual.[24]

3. RELEVANCE OF THE DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION

A party usually requests an anti-suit injunction to restrain the opposing party from starting or continuing a proceeding in another forum. Thus anti-suit injunctions might be issued in domestic as well as international arbitral or court proceedings. This paper will focus on anti-suit injunctions issued in international proceedings, meaning that the anti-suit injunction is rendered by an arbitral tribunal, or a court of a country other than the one where arbitral or court proceedings dealing with the same subject-matter are already pending. Therefore, for the purpose of this paper, internationality is given when at least two different jurisdictions are involved, meaning that the seat of the arbitral tribunal and the court concerned with the issue of an anti-suit injunctions are situated in different countries. In this respect, the country-specific definition of international and domestic arbitration, as described above, does not play a role.

Nevertheless, the differentiation remains important when it comes to country specific issues in connection with anti-suit injunctions, provided that the country involved has a different regulation for international and domestic arbitration.

Furthermore, it is also important when it comes to the enforcement of an order containing an anti-suit injunction. As has been shown above, signa-

---

[23] Girsberger D Voser N op cit 7.
[24] Blackaby N et al op cit para 1.36.

tory states of the New York Convention are compelled to determine whether the arbitration is domestic or international since the New Convention only applies when a foreign, i.e. international award, is concerned.

III. Anti-suit Injunctions: An Overview

1. DEFINITION

An anti-suit injunction is a procedural tool used by courts, or possibly an arbitral tribunal, to issue restraining orders at the request of the anti-suit injunction seeker in order to prevent a party from starting or continuing court proceedings instead of an arbitration procedure in the case of an arbitral agreement or an arbitration procedure instead of a court procedure.[25] This definition shows that there is generally a wide field of application for anti-suit injunctions in domestic as well as international arbitration. Anti-suit injunctions might be issued in pure litigation proceedings as well. This could be the case, when the parties formerly agreed upon a jurisdiction agreement, but one of the parties does not abide by it and starts legal proceedings at another legal venue. However, since this paper will focus on the *West Tankers* decision and therefore on the remedy's field of application in connection with international arbitration, these cases will only be discussed in the context of the historical development of anti-suit injunctions or else when they were constitutive for the ECJ's *West Tankers* decision.

The prerequisites for the grant of an anti-suit injunction have changed consistently throughout its historical development.[26] In order to understand some of today's features and prerequisites of the anti-suit injunction and the implications there from, it is necessary to investigate its historical development.

---

[25] Raphael T *The anti-suit injunction* (2008) 3.
[26] Raphael T op cit 41.

2. HISTORICAL DEVELOPMENT

2.1. Early Origin

The anti-suit injunction had its historical roots in the English law system.[27] The English state law comprised of the common law courts and the Courts of Chancery, until they merged through the Supreme Court of Judicature Acts 1873 and 1875[28] respectively.[29] As opposed to the common law courts, the Courts of Chancery were generally responsible for the equitable jurisdiction[30] to prevent and set aside judgments of the common law courts that were "obtained by oppression, wrong, and a hard conscience".[31] In this situation, the Courts of Chancery deployed the anti-suit injunction from the common injunction to prevent common law courts' judgments contradicting the principles of equity.[32] Common injunctions applied when an equitable right was infringed by common law or else 'where the ends of justice required interference, for example to put an end to vexatious and oppressive litigation or a multiplicity of suits'.[33]

Therefore, anti-suit injunctions assimilated all the principles of equity law.[34] This implies that the addressee of the restraining order is always the counterparty in personam who could then be held for contempt of court in case of non-compliance with such an order.[35] As opposed to that, the common law courts secured the enforcement of their judgments in rem, meaning for example, by actual seizure of the subject-matter of an action. An injunction, on the other hand, does not affect the subject-matter of an action. Furthermore, there was the general understanding that only a party whose actions were equally equitable was entitled to file for an injunction ('he who seeks equity must do equity'[36]). Equity is also built on the principle

---

[27] Wilson ME 'Let go of that case! British anti-suit injunctions against Brussels Convention members' (2003) *36 Cornell International Law Journal 207* at 212.
[28] English Supreme Court of Judicature Acts, 1873 and 1875, repealed by the Constitutional Reform Act, 2005. Available at http://www.legislation.gov.uk/ukpga/Vict/54-55/53/introduction (last accessed 18 July 2011).
[29] Krause J *Anti-suit injunctions als Mittel der Jurisdiktionsabgrenzung* (2005) 48.
[30] Krause J op cit 47.
[31] *Earl of Oxford's Case* (1615) 21 ER 485 at 487.
[32] Raphael T op cit 42.
[33] Raphael T op cit 42.
[34] Krause J op cit 60.
[35] Krause J op cit 56.
[36] *Earl of Oxford's Case* op cit at 488.

that an injunction could not be obtained in case the respective party was entitled to any claim based on common law, such as a claim for damages.[37] However, the English courts could also refuse to rule according to this principle, in circumstances where they considered a simple claim for damages an ineffective means for the respective party deprived from a certain legal venue.[38] It was also important that a party did not hesitate to file for an injunction, because according to equity principles, equity bears no delay.[39]

Eventually, the English Courts began to expand the field of application for injunctions. Since not only English Courts, but also courts abroad could rule by non-observance of equitable principles, by the end of the 19th Century restraining orders concerning courts abroad were granted continuously.[40] In the course of time, the courts decided to only grant common injunctions on the ground that the 'ends of justice' required it and not on the grounds of a substantive equity alone.[41]

2.2. Consolidation of the Equity and Common Law Courts

The Supreme Court of Judicature Acts of 1873 and 1875 respectively reorganized the English court system and created the High Court and the Court of Appeal.[42] The Court of Chancery became one of the three divisions of the High Court and equity could now be applied in all of the divisions.[43] At the same time, the prerequisites to grant anti-suit injunctions developed along the lines of the grant of a stay of local proceedings, another procedural subject, which had a close reference to anti-suit injunctions.[44] The stay of local English proceedings was granted when the proceedings were 'vexatious or oppressive' or an 'abuse of its process'.[45] The test implied that the English proceedings were either 'utterly groundless and absolutely without foundation'[46] or brought by 'an action in bad faith with the motive of

[37] Krause J op cit 58.
[38] Krause J op cit 59.
[39] Ibid.
[40] Raphael T op cit 43.
[41] *Bushby v Munday* (1821) 5 Madd 297 at 307.
[42] Raphael T op cit 47.
[43] Ibid.
[44] Raphael T op cit 48.
[45] *McHenry v Lewis* (1883) LR 22 Ch D 397 at 408.
[46] *Dawkins v Prince Edward of Saxe Weimar* (1875-1876) LR 1 QBD 499 at 502-503.

vexatiously harassing the defendant'.[47] With respect to anti-suit injunctions, the Court of Appeal decided that vexation or oppression was also a necessary condition to grant such injunctions to prevent foreign proceedings, at least when there was no independent substantive equitable right.[48] Generally, one could say that during the 19th Century, the requirement for 'vexation or oppression' was the primary applicable test for the grant of anti-suit injunctions.[49] The English courts were aware that they should grant injunctions only 'very rarely and with great caution'[50] in order to prevent 'the appearance of undue interference with another court'[51]. Thus, even back then, English judges realized that the grant of an injunction would also interfere with a foreign jurisdiction, even if the injunction was in personam.

2.3. Doctrine of Forum Non Conveniens

At the end of the 20th Century, the prerequisites to grant the stay of local English proceedings changed and did not require vexatious or oppressive litigation anymore. Instead, the Scottish forum non conveniens doctrine started to play a major role.[52] This common law legal doctrine means that if there is a more appropriate legal venue than the one chosen by the claimant, a court may deny its jurisdiction over this case, reverting the party to the more appropriate legal venue. In Scotland, the parties had to file an application for forum non conveniens in order to challenge and defeat the court's jurisdiction[53], as opposed to England where a stay of local proceedings could be granted under the prevailing circumstances. In case a forum non conveniens motion was brought forward, the Scottish judges had to be 'satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'.[54] In recognition of the Scottish forum non conveniens doctrine, a litigant in England could be granted a stay of proceedings if he could demonstrate that the foreign forum was evidently the more

---

[47] *McHenry v Lewis* (1883) op cit at 408.
[48] *Hyman v Helm* (1883) LR 24 Ch D 531 at 540.
[49] Raphael T op cit 48.
[50] *Settlement Corp and Others v Hochschild* [1966] 1 Ch 10 at 15G.
[51] *Cohen v Rothfield* [1919] 1 KB 410 at 413.
[52] Krause J op cit 83.
[53] Krause J op cit 84.
[54] *Sim v Robinow* (1892) 19 R 665 at 668.

appropriate forum.[55] This change of concept also had an impact on the grant of anti-suit injunctions. The view was advanced that 'the principles applying to injunctions and stays of proceedings should be the same, and that the anti-suit injunction could be granted on the sole ground that England was the most appropriate forum for the litigation, so long as the injunction would not deprive the injunction defendant of a legitimate juridical advantage in the foreign jurisdiction'.[56] But this approach was soon criticised, as it was seen as incompatible with the principle of comity of nations.[57] In *British Airways Board v Laker Airways Ltd*, judicial comity was defined as 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards'[58]. Furthermore, the test for a stay of proceedings and for the grant of an anti-suit injunction was not agreed as being the same.[59] Therefore, this precedent did not prevail.

2.4. Unconscionable Conduct

A retrogressive step in the history of anti-suit injunctions was the decision of the House of Lords. Here it was held that anti-suit injunctions could be granted in cases 'in which the plaintiff seeks against a person amenable to the jurisdiction of the English High Court an injunction to restrain the defendant from bringing suit against him in a foreign court upon the ground that the plaintiff is entitled under English law to a legal or equitable right not to be sued in that foreign court by that person upon the cause of action that is the subject of such proceedings'.[60] Furthermore, the decision held that 'if under English law a defence would be available to the injunction-seeker, that defence may be given anticipatory effect as a right not to be sued that is enforceable by injunction in an action for a declaration of non-liability'[61]. Moreover, this decision pointed out that to all these defences 'the generic description of conduct that is "unconscionable" in the eye of English law may be given'[62]. Following this decision, the criteria of 'unconscionable

[55] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) at 476C-476E.
[56] *Castanho v Brown and Root (UK) Ltd and Another* (1980) 1 WLR 839 at 869.
[57] *Société Nationale* Industrielle *Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC) at 895G.
[58] *British Airways Board v Laker Airways Ltd and Others* [1984] QB 142 (CA) at 185H-186A.
[59] *Société Nationale* Industrielle *Aérospatiale v Lee Kui Jak* op cit at 882D-882E.
[60] *British Airways Board v Laker Airways Ltd and Others* [1985] AC 58 (HL) at 82C.
[61] *British Airways Board v Laker Airways Ltd and Others* op cit (n 60) at 82D.
[62] *British Airways Board v Laker Airways Ltd and Others* op cit (n 60) at 82E.

conduct' for a short time became the primary applicable test for the grant of anti-suit injunctions.[63] But the concept of 'unconscionable conduct' was not sound, since it only implied a conduct which was contrary to good conscience, but the concept was lacking a further definition of the particular extent of misconduct.[64]

2.5. Back to the Ends of Justice and the Requirement of Vexation and Oppression

In *Société Nationale Industrielle Aérospatiale v Lee Kui Jak,* the English courts decided to apply the originally developed principles, but slightly modified them. The following principles were considered to be beyond dispute in order to grant an anti-suit injunction and hence to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction:

'(1) The jurisdiction is to be exercised when the ends of justice require it, i.e. the foreign proceedings were vexatious or oppressive;

(2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed;

(3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy and;

(4) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution' [65].

Additionally, the decision held that 'in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive'.[66] In this

---

[63] *Midland Bank Plc and Another v Laker Airways Ltd and Others* [1986] QB 689 (CA); *South Carolina Insurance Co v Assurantie Maatschappij 'de Seven Provincien' NV* (1987) AC 24 (HL) at 40D.
[64] Raphael T op cit 55.
[65] *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* op cit at 892.
[66] *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* op cit at 896-897.

regard, it was stated that either the English or the Brunei court has to consider itself to be the natural legal venue and that a possible injustice for the party being restrained from legal proceedings must be taken into account as well'.[67]

This modernized concept of vexation and oppression soon became the relevant test to be applied and was accepted as expressing English law.[68] Nevertheless, at the same time as the judgment in the matter of *Donohue v Armco* was rendered, the House of Lords adjudicated again on the grant of an anti-suit injunction, referring in turn to unconscionable conduct as the primary test to be applied.[69] Subsequent decisions seemed to rely on both concepts, i.e. unconscionable conduct, and vexatious and oppressive behaviour, in the sense that vexatious and oppressive behaviour constituted an example of unconscionable conduct as the superior concept.[70]

2.6. Anti-suit injunctions in Protection of Exclusive Jurisdiction and Arbitration Agreements

Besides the category of anti-suit injunctions in the case of an abuse of process, another major category of anti-suit injunctions was established during the 20th Century. These anti-suit injunctions were obligation-based, meaning that the choice of forum had been either directly or indirectly the subject of a contract between the parties.[71]

In England, the choice of forum agreement represents not only a procedural agreement of the parties, which would give a party the right to plea of lack of jurisdiction if a court action was filed in another forum as the one that was agreed, but a substantive and therefore actionable right to be heard by the court of the agreed forum. In other words 'the right not to be sued abroad'.[72] Therefore, if a party conducted a lawsuit in breach of a choice of forum agreement, it was seen as a violation of a legal or equitable

---

[67] Ibid.
[68] *Donohue v Armco Inc* (2002) CLC 440 (HL) at 447-448.
[69] *Turner v Grovit* (2002) 1 WLR 107 (HL) at 118.
[70] See *Glencore International AG v Exeter Shipping* (2002) CLC 1090 at 1098 and 1102 as an example.
[71] Raphael T op cit 56.
[72] Ingenhoven T *Grenzüberschreitender Rechtsschutz durch englische Gerichte: prozessuale Gestaltungsmöglichkeiten für ausländische Unternehmen im Forum London* (2001) 289.

right which could only be indemnified by the grant of an anti-suit injunction, seen as the only effective remedy.[73] A simple monetary compensation for breach of contract was viewed as an inadequate means to protect the contractual rights of the relevant party.[74]

Thus, the prerequisites for this category of injunctions differ in their essence from the general concept of vexation and oppression of non obligation-based injunctions.

Therefore, it was held that the general rule was clear that 'if contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, was depending on all the facts and circumstances of the particular case'.[75]

Furthermore, it was established that an anti-suit injunction could be granted to secure an arbitration clause on which the parties had agreed on.[76]

3. LEGAL BASIS AND CURRENT CATEGORIES IN ENGLAND

3.1. Legal Basis

Today, s 37 of the Senior Courts Act represents the legal foundation for the High Court to grant anti-suit injunctions.[77] According to para 1 of s 37 of the

---

[73] *Continental Bank N.A. v Aeakos Compania Naviera S.A* [1994] 1 WLR 588 at 598.
[74] Ibid.
[75] *Donohue v Armco Inc* op cit at 449F-H; *Continental Bank N A v Aeakos Compania Naviera SA* op cit at 598E-F.
[76] *Aggeliki Charis Compania Maritima SA v Pagnan SpA* (The Angelic Grace) [1995] 1 Lloyd's Rep 87 at 96.

Act, 'the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'.[78] An interlocutory injunction will be granted as an interim measure during ongoing proceedings, whereas the final injunction will only be granted after the regular main proceedings have taken place.[79]

With respect to arbitration, there is an explicit reference in ss 44(1) and 44(2)(e) of the Arbitration Act 1996[80] stating that 'unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings'.[81] The grant of an interim injunction is listed under these matters.[82]

3.2. Current Categories and Sub-Categories

Since the anti-suit injunction is seen as a remedy and not as a cause of action, the grant of such an injunction calls for an existing claim, which can either be found in the common or equitable law.[83] In this respect, the English jurisdiction today differentiates between several categories of cases in which anti-suit injunctions might be granted. As can be seen from the historical development of the injunction, the two main categories are the non obligation-based and the obligation-based anti-suit injunctions.[84]

For the purpose of understanding, the non-obligation-based anti-suit injunction will briefly be outlined hereinafter. Nevertheless, today's prerequisites will not be assessed in detail since, for the purpose of this paper, only the obligation-based category is relevant.

---

[77] English Senior Courts Act, 1981. Available at http://www.legislation.gov.uk/ukpga/1981/54/contents (last accessed 18 July 2011).
[78] English Senior Courts Act op cit s 37(1).
[79] Jegher G *Abwehrmassnahmen gegen ausländische Prozesse* (2004) 92.
[80] English Arbitration Act op cit.
[81] English Arbitration Act op cit s 44(1).
[82] English Arbitration Act op cit s 44(2)(e).
[83] *British Airways Board v Laker Airways Ltd* op cit (n 60) at 81.
[84] Balthasar S Richers R 'Europäisches Verfahrensrecht und das Ende der anti-suit injunction (2009) *Heft 6 Recht der internationalen Wirtschaft* at 352.

3.2.1. Non-obligation-based Anti-suit Injunctions

3.2.1.1. Alternative Forum Cases

This category includes cases where the claimant has more than one possible forum abroad to file a lawsuit.[85] Since the principle of comity is generally accepted, an anti-suit injunction will only be granted in case the English forum is seen as the natural forum to claim, meaning that the English court must have jurisdiction over the respective anti-suit injunction defendant.[86] Furthermore, the conduct of that case abroad must be seen as vexatious and oppressive.[87] This will be the case when the claimant (and anti-suit injunction defendant) began a case abroad in bad faith, or if there is no prospect of success at all, or if an English court proceeding will be undermined.[88] It might also be that the subject-matter of the case has a weak connection to the forum abroad or that the respondent (and anti-suit injunction claimant) has to face unjustified disadvantages with respect to that foreign forum.[89]

3.2.1.2. Single Forum Cases

This category includes cases where the claimant (and anti-suit injunction defendant) has only one possible forum abroad to file a lawsuit. As a consequence, since there is only a single forum abroad, England cannot be seen as the natural forum as a prerequisite to grant such an anti-suit injunction.[90] Instead, English courts consider it sufficient if England has an adequate relation or interest in the subject-matter of that case.[91] Given that prerequisite, the anti-suit injunction will be granted if the conduct of the case abroad is seen as unconscionable.

---

[85] Jegher G op cit 94.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Jegher G op cit 95.
[91] Jegher G op cit 96.

3.2.2. Obligation-based Anti-suit Injunctions

This category includes the cases where there is an obligation-based right not to be sued abroad.[92] This right might arise out of an exclusive jurisdiction agreement, through which the parties committed themselves to only institute legal proceedings in a certain subject-matter in the particular court they had agreed on. Furthermore, it might arise in the case of an arbitration agreement, through which the parties agreed that legal proceedings in a certain subject-matter shall be heard by an arbitral tribunal instead of the competent court or as the result of a settlement of the parties whereby it was agreed not to litigate the respective subject-matter anymore.[93]

4. GENERAL PREREQUISITES OF OBLIGATION-BASED ANTI-SUIT INJUNCTIONS

As a formal prerequisite, the order of an anti-suit injunction demands that the English court has personal jurisdiction over the defendant of the anti-suit injunction.[94] Besides that, there are two material prerequisites. First of all, the applicant of the anti-suit injunction needs to be entitled to injunctive relief. Such an entitlement would generally arise out of the legal relationship between the parties, be it that the parties agreed upon a certain court of jurisdiction for the disputed matter or referred it to arbitration. As a consequence, both parties would have to start legal proceedings before the agreed forum and could be restrained from starting a lawsuit before any other court.[95] Second, the respective court has to weigh the parties' interests and to verify if the respective proceedings indeed shall be interdicted.[96]

In general, the principles to grant an obligation-based anti-suit injunction are referred to as the "Angelic Grace Principles", after the decision of the English Court of Appeal, where they became apparent for the first time.[97]

Under the Angelic Grace Principles, it can be stated that insofar as a party is bound by a valid exclusive jurisdiction agreement, but nevertheless institutes proceedings before another legal venue, the English court will as a

---

[92] Jegher G op cit 93.
[93] Jegher G op cit 94.
[94] Peyer PR *'Vollstreckung unvertretbarer Handlungen und Unterlassungen'* (2006) 61.
[95] Balthasar S Richers R op cit 352.
[96] Ibid.
[97] *Aggeliki Charis Compania Maritima SA v Pagnan SpA* (The Angelic Grace) op cit at 96.

rule issue a restraining order to prevent the party in breach of such agreement from instituting proceedings abroad.[98] In a case where the breach of contract is already established or there is a high probability of this, there is no need for an English court to act with caution[99]. Thus, in less obvious cases it is still suitable to exercise caution. The requirement of a vexatious, oppressive or unconscionable conduct, as opposed to the non-obligation-based anti-suit injunction, also ceases to apply.[100] Since the breach of a jurisdiction agreement in England constitutes a violation of a substantive and therefore actionable right in itself[101] which has been outlined above,[102] the grant of an anti-suit injunction in such cases is justified by the force of the contractual obligation itself.[103] Although in some case in the decisions that followed, it were held that the breach of an exclusive jurisdiction agreement in itself should be seen as vexatious, oppressive or unconscionable conduct.[104] However, even if one of the parties filed a lawsuit and thus violated an exclusive jurisdiction clause, the party may not be eligible for the grant of an anti-suit injunction since the court always acts with discretion and in the interest of justice.[105]

To avoid a restraining order, the party in breach still has the possibility of showing strong reasons that argue against the anti-suit injunction.[106] The burden of proof to show strong reasons is imposed on the party in breach.[107] Since the injunction can impose other injustices' to the injunction defendant, the court has the possibility to ask for appropriate endeavours from the injunction claimant before granting relief.[108]

The English judges found strong reasons to refrain from granting a restraining order. They considered a temporal deferral between the institution of legal proceedings abroad and the filing of the motion for the grant of an

---

[98] *Continental Bank N.A. v Aeakos Compania Naviera S.A* op cit at 598.
[99] *Aggeliki Charis Compania Maritima SA v Pagnan SpA* (The Angelic Grace) op cit at 96.
[100] Ibid.
[101] Ingenhoven T op cit 289.
[102] See section III/2/2.6 above.
[103] Raphael T op cit 179.
[104] Raphael T op cit 178.
[105] Raphael T op cit 173.
[106] *Donohue v Armco Inc* op cit at 453D.
[107] Ibid.
[108] Raphael T op cit 175.

anti-suit injunction with the English courts[109], the voluntary submission of the anti-suit injunction claimant to the jurisdiction of the court abroad[110] or a conflict of interests of third parties which are not bound by the exclusive jurisdiction agreement[111] all as strong reasons.

Since the entitlement of the injunction-seeker is dependent on the existence of an exclusive jurisdiction agreement, this agreement must also be enforceable.[112] Furthermore, the injunction defendant has to be party to this agreement which must be binding and valid and the claim brought in proceedings abroad must be in the scope of this agreement.[113]

The same principles also apply mutatis mutandis in cases where the parties agreed on an arbitration agreement.[114]

5. ISSUER OF RESTRAINING ORDERS

In connection with arbitral proceedings, the issuer of a restraining order could either be a competent national court at the seat of the arbitral tribunal or in another country, possibly the injunction claimant's home jurisdiction, or the arbitral tribunal itself as the case may be.

6. ADDRESSEE OF THE ORDER

The addressee of the order is not the foreign court or the arbitral tribunal where the claim is already pending or will be filed with, but the anti-suit injunction respondent in personam.[115] Thus the order does not have any direct effect on the other court. However, in the view of many scholars, since it interferes with a courts venue jurisdiction, it still indirectly affects the court abroad.[116]

---

[109] Krause J op cit 138.
[110] Krause J op cit 143.
[111] Krause J op cit 144.
[112] Raphael T op cit 182.
[113] Ibid.
[114] Raphael T op cit 193.
[115] Dutta A Heinze C 'Anti-suit injunctions zum Schutze von Schiedsvereinbarungen' (2007) *Heft 6 Recht der internationalen Wirtschaft 411* at 415.
[116] Raphael T op cit 11.

7. CONSEQUENCES OF NON-COMPLIANCE

In case of non-compliance with such order, the respective anti-suit injunction respondent has to face quite damageable consequences due to his contempt or disobedience of the court order. The punishment for contempt of court can impose administrative (monetary) penalties, arrest, imprisonment or a possible seizure of assets of such party.[117] Moreover, any decision issued by a foreign court in breach of an English anti-suit injunction might not be recognisable and enforceable in the United Kingdom, due to the public order proviso stated in the Brussels Convention[118] as well as in Brussels I Regulation[119] to which England is a signatory state.

8. CONCLUSION

As can be seen from its historical roots, the anti-suit injunction is a purely common law tool, which could only come into existence due to the partition of the English courts, previously in a common law and an equity law division.[120] Once these courts were merged and the application of the anti-suit injunction was extended to restrain foreign proceedings, English judges had a vigorous means at hand to protect England, in particular London, as a place of litigation and arbitration and as an economic region.[121] It was therefore described as a mysterious legal instrument and classified as the most iridescent aspect of English international civil procedural law.[122] However, since the procedural law of common law countries is focused on discretion, the parties involved and on the final result it creates in practice, the development of a remedy such as the anti-suit injunction made sure that English judges could engage with particular cases if justice could not be enshrined otherwise. Nevertheless, the English judges were still bound by the guidelines of their own case law, such that, in my opinion, this classifi-

---

[117] Wilson ME op cit 214.

[118] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 23 September 1968, as later amended by the accession conventions of 1978, 1982, 1989 and 1996 (hereinafter "Brussels Convention") art 27. Available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm (last accessed 14 May 2011).

[119] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (thereafter "Brussels I Regulation") art 34.

[120] See also Raphael T op cit 59.

[121] Ibid.

[122] Ingenhoven T op cit 272.

cation does not cope with the anti-suit injunction. Hence the constant changing of tests that were declared to be applicable over time also had a disadvantage, since it left a great degree of uncertainty for legal practitioners. It seems understandable from this why some of these practitioners – especially those with a civil law background – were not attached to it.

On the other hand, anti-suit injunctions were completely unknown in European civil law systems[123]. Civil law countries generally assume that due to the principle of sovereignty, each court should decide if a lawsuit was properly brought before it according to national law and policy.[124] Furthermore, 'that it must always amount to an illegitimate interference with the adjudicatory jurisdiction of a court for another court to decide whether or not that adjudicatory jurisdiction can or cannot be invoked'[125]. This argumentation of course does not support the use of a procedural means, such as the anti-suit injunction, even if it is not addressed to the court itself but to the party, since arguably it can be seen as an indirect interference with that court's jurisdiction.

Therefore, it does not come as a surprise that the anti-suit injunction was a bone of contention in the EU and subject to several decisions of the ECJ. Among these was the *West Tankers* decision which will be analysed below.

IV. The *West Tankers* decision of the ECJ

1. Background of the Decision

1.1. Relevant Legal Framework in General

Thereafter follows a summary of the rules and regulations and its underlying principles that were decisive for the reasoning of the *West Tankers* decision. This is mainly treaty law with respect to jurisdictional issues and the recognition and enforcement of judgments, applicable to the Member

[123] Hueske W 'Rule, Britannia! A proposed revival of the British antisuit injunction in the E.U. legal framework' (2009) *41 George Washington International Law Review* 433 at 456.
[124] Raphael T op cit 16.
[125] Ibid.

States of the EU, and in case of Switzerland of the EU and EFTA[126], i.e. the Brussels/Lugano Regime[127], and the New York Convention.

1.2. Applicable Law to the Anti-suit Injunction

International commercial arbitration often involves more than one state law.[128] There is the law governing the arbitration agreement and its performance, the lex arbitrii governing procedural issues of the tribunal, the substantive law applicable to the subject-matter of the dispute and the law governing the recognition and enforcement of the arbitral award.[129] Thus in such cases, a court has to decide on the law applicable to the anti-suit injunction.

It could be argued that the injunction relief "not to be sued abroad" should be assessed according to the lex fori of the court involved, since the procedural aspect of the anti-suit injunction outweighs the substantive entitlement.[130] On the grounds that the anti-suit injunction purposes the protection of the arbitral proceedings, and that such protection granted by state courts should not exceed what is provided for according to the lex arbitrii, the latter should be applicable.[131] Furthermore, the argument that the grant of an anti-suit injunction actually concerns the scope and effect of the contractual obligations generated by the arbitration agreement, and that such scope and effect have to be assessed according to the law governing the arbitration agreement, speaks for the applicability of the latter.[132] This argument has indeed been considered as the most convincing one and I personally agree.[133] Moreover, the law governing the arbitration agreement is often the same law as the substantive law applicable to the subject-matter of the dispute. Generally speaking, it is most often a law whose applicability the parties had to expect, so that as a result they would be less surprised by any

---

[126] European Free Trade Association between Switzerland, Norway, Iceland and Liechtenstein which is a parallel organization of the EU and is closely related to it.
[127] See below s IV/1/1.5.
[128] Blackaby N et al op cit para 3.07.
[129] Ibid.
[130] Dutta A Heinze C op cit 412.
[131] Dutta A Heinze C op cit 413.
[132] Ibid.
[133] Ibid.

outcome, as the case may be when a state court applies its lex fori. The English courts advance the same view.[134]

In the *West Tankers* decision the English courts applied English law for the grant of the anti-suit injunction requested, since the contract and the arbitration agreement between the parties was governed by English law. The legal basis for the grant of anti-suit injunctions in English law has been stated above.[135]

1.3. Relevant Legal Framework in the EU

1.3.1. Brussels Convention and Brussels I Regulation

The Brussels Convention was adopted in Brussels in 1968.[136] It dramatically altered the former system of bilateral recognition and enforcement treaties and created a European body of procedural law applicable for all the Member States of the European Economic Community, which subsequently became the European Community and then the EU.[137] In December 2000, it was adopted as a regulation generally referred to as Brussels I Regulation by the Council of the EU, and became the official law for the Member States of the EU when it entered into force on 1 March 2002.[138]

The Brussels Convention as well as the Brussels I Regulation determines the court of a Member State that has jurisdiction to hear a dispute. Furthermore, it contains the principle that a judgment rendered in one of the Member States is recognisable and enforceable in all other Member States. There are only a few limited exceptions from that principle.[139] Furthermore, the regulation of civil proceedings remained part of each Member States' national law and is thus far from being uniform.[140]

---

[134] Raphael T op cit 171.
[135] See above s III/3/3.1.
[136] Reuland RC 'The Recognition of Judgments in the European Community: The Twentyfifth Anniversary of the Brussels Convention' *14 Michigan Journal of International Law* 559 at 563 et sqqs.
[137] Ibid.
[138] Wilson ME op cit at 209.
[139] Brussels I Regulation op cit art 34.
[140] Lenenbach M 'Antisuit injunctions in England, Germany and the United States: Their Treatment under European civil procedure and the Hague Convention' (1998) *20 Loyola of Los Angeles International and Comparative Law Journal 257* at 306.

The scope of application of the Brussels I Regulation includes civil and commercial matters whatever the nature of the court or tribunal, but explicitly excludes arbitration.[141]

The key factor and basic principle for conferring jurisdiction is the domicile of the respondent according to art 2.[142] In other words, an action can always be brought against a party before the courts at the domicile of that party, unless the special jurisdiction provisions are applicable.

With regard to parallel proceedings, the Brussels I Regulation - in contrast to the anti-suit injunction - provides for the lis pendens principle.[143] This principle signifies that the court first seized in a dispute always decides on its own jurisdiction, whereas the court seized second in the same dispute, and between the same parties, shall meanwhile stay the proceedings. The application of this rule to a case is uncomplicated and inflexible, in order to provide legal certainty and predictability in international disputes.[144] Nevertheless, it still gives leeway to a party, expecting a lawsuit to be filed with an agreed legal venue, to file a pre-emptive declaratory judgment in another legal venue as the one agreed to, known to be inefficient and overload[145]. Due to the lis pendens principle, the other party has no choice other than to object to the jurisdiction of that court, based on the exclusive jurisdiction clause. The court first seized would then have to decide a range of issues, in particular if the exclusive jurisdiction clause was valid.[146] Since this outcome is unpredictable, the other party would generally await this decision before starting legal proceedings in the agreed venue, because if the court first seized came to the conclusion that it has jurisdiction, the court second seized would decline its jurisdiction and presumably impose the costs on that other party. However, even if the other party filed a lawsuit with the agreed venue, this court would still have to stay the proceedings right away due to the lis pendens principle. Thus it can be said that the other party is at least confronted with a considerable delay, and the time factor is often pivotal in litigation. A party might become insolvent, so that even a favour-

---

[141] Brussels I Regulation op cit art 1(2)(d).
[142] Wilson ME op cit at 210.
[143] Brussels I Regulation op cit art 27.
[144] Hueske W op cit at 433.
[145] Ibid.
[146] Hueske W op cit at 434.

able judgment would be of no use for the other party since under these circumstances it can no longer be enforced.

1.3.2. New York Convention[147]

Arbitration was at the time excluded from the scope of the Brussels Convention and Brussels I Regulation, supposedly since all the Member States of the EU were also signatory states to the New York Convention.[148]

The New York Convention mainly administers the recognition and enforcement of foreign arbitral awards, but contains also a provision providing for a court to refer parties to arbitration under the individual prevailing circumstances. In this respect the New York Convention states that the court of a signatory state is obliged to give effect to an arbitration agreement by referring the parties to arbitrate when seized in an action in a matter covered by an arbitration agreement, provided that the requirements of art 2 of the New York Convention are met[149]. Thus the exclusion of arbitration from the Brussels I Convention and its predecessors was a logical consequence.

The respective court will assess the existence of the requirements of art 2 of the New York Convention as preliminary issues[150] and thus review if the arbitration agreement is valid and if the subject-matter is capable of being settled by arbitration[151]. The outcome of such a review is often unpredictable, as it often includes the application of different sets of substantive and procedural law[152]. Furthermore, there is no corresponding interpretation of the requirements set by art 2 of the New York Convention[153]. A national court, therefore, still has leeway to declare its own jurisdiction in case there is an arbitration agreement.

---

[147] New York Convention op cit.
[148] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM (2010) 748 final (thereafter "Proposal") 34. Available at http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,de&lng2=de,en,fr,&val=548494:cs&page= (last accessed 18 July 2011).
[149] New York Convention op cit art 2(3).
[150] Graffi LD 'Securing harmonized effects of arbitration agreements under the New York Convention' (2006) *28 Houston Journal of International Law 663* at 691.
[151] New York Convention op cit art 2.
[152] Graffi LD op cit at 694.
[153] Graffi LD op cit at 671.

1.4. Possible Future Changes to the Brussels I Regulation?

1.4.1. General

One of the weaknesses of the Brussels I Regulation was a lack of rules with respect to the interface of litigation and arbitration. Not least the *West Tankers* decision was a contributor to this awareness since it centred mainly on the question as to what extent the Brussels I Regulation excludes national courts to answer preliminary issues in alleged arbitral proceedings.[154]

The European Commission adopted a proposal containing, amongst others, a modification of the Brussels I Regulation in this regard.[155] To become applicable law in the EU Member States, the proposal would have to successfully pass the ordinary legislative process, which normally takes around two to three years.

The envisaged changes with regard to arbitration will be outlined briefly below.

1.4.2. Interface between Arbitration and Court Proceedings

As has been mentioned above, the Brussels I Regulation excluded arbitration which was covered by the national law of the respective EU Member State and the New York Convention.[156] However, the relation of arbitration and court proceedings remained problematical since the courts of Member States could, on request, intervene in legal disputes that had been brought before an arbitral tribunal.[157]

Therefore, the reformed Brussels I Regulation, if adopted, will contain a specific rule on the relation between arbitration and court proceedings. According to the proposal, a court whose jurisdiction is contested due to an al-

---

[154] See below s IV/4.

[155] Proposal op cit.

[156] New York Convention op cit.

[157] Impact Assessment Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM (2010) 1547 final (thereafter "Impact Assessment") 34. Available at http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf (last accessed 18 July 2011).

leged arbitration agreement shall stay the proceedings if an arbitral tribunal has been seized of the case, or court proceedings relating to the arbitration agreement have been commenced in the Member State at the seat of the arbitration.[158] Furthermore, it states that where the existence, validity or effects of the arbitration agreement are established, the court which stayed its proceedings shall decline jurisdiction.[159]

Furthermore, recital 11 of the proposal further clarifies the relation between court and arbitration proceedings, since it not only states generally that the regulation is not applicable to arbitration, but explicitly mentions that it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards.[160]

1.4.3. Evaluation of Proposed Changes

As the European Commission rightly recognized, the proposal will definitely prevent parallel court and arbitration proceedings and abusive tactical litigation, since the court of a Member State will always have to refer to the arbitral tribunal with regard to jurisdiction.[161] Hence an adoption of the proposal in this respect is, in my opinion, welcome.

Nevertheless, it is questionable if it will become applicable law. The arbitration and the litigation community are often affected by mistrust towards one another and there is a strong opinion present amongst litigators that jurisdiction should remain exclusively a matter of the state. The rule, as suggested by the proposal, undermines a court's jurisdiction whenever there is an arbitration agreement allegedly already existent, as the court has to refer the parties to the arbitral tribunal. Thus, this rule is bound to raise questions and consequently there is a good chance that it will not be accepted and adopted.

---

[158] Proposal op cit 9.
[159] Proposal op cit 36 art 29 para 4.
[160] Proposal op cit 15 recital 11 of the preamble.
[161] Impact Assessment op cit 38.

1.5.2. New York Convention

Switzerland is also a signatory state of the New York Convention.

Thus the same explanations above with regard to the Member States of the EU also apply to Switzerland.[171]

1.6. Possible Future Changes to the Lugano Convention?

Since the Lugano Convention is a parallel treaty to the Brussels I Regulation, it is to be expected that once the changes proposed to the Brussels I Regulation are applicable law in the EU Member States, the Lugano Convention will be adapted accordingly. Therefore, it reference can be made to the explanations above.[172]

1.7. Effect of Europe's Legal Framework on Anti-suit Injunctions

It seems that the only answer the Brussels/Lugano Regime provides towards jurisdiction of the Member States' courts in parallel proceedings is the lis pendens principle. This clearly shows the preponderance of the civil law system in Europe.[173] As opposed to that, the (English) common law approach provides for anti-suit injunctions in transnational parallel litigation proceedings, as a discretionary and customized judicial case-by-case solution.

The lis pendens principle leads to a uniform and therefore predictable application of the Brussels I Regulation and Lugano Convention, providing legal certainty for practitioners and the parties concerned, which is to be seen as an advantage. On the other hand, the disadvantage of a codified inflexible method is obvious. The fixed parameter of a legal codification does not give leeway to judges to take into account the multiplicity of special circumstances which are characterize in many cases.[174] Thus it often lacks the ability to individually respond to a case where it is deemed necessary.

---

[171] See above s IV/1/1.3/1.3.2.
[172] See above s IV/1/1.4.
[173] Hueske W op cit at 442.
[174] Georg JP 'International Parallel Litigation – A Survey of current Conventions and Model Laws' (2002) *37 Texas International Law Journal 499* at 510.

1.5. The Relevant Legal Framework in Switzerland

1.5.1. Lugano Convention

Switzerland, as a member of the EFTA and the Member States of the EU, prepared the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, generally referred to as Lugano Convention.[162] The Lugano Convention is a parallel treaty to the Brussels I Regulation.[163] The former Lugano Convention[164] concluded in 1988, was still based on the Brussels Convention and did not yet reflect the Brussels I Regulation. Therefore, it had to be replaced, understanding the changes and modifications of the Brussels I Regulation. The adapted Lugano Convention, in line with the Brussels I Regulation, came into effect as of 1 January 2011.

As with the Brussels I Regulation, the Lugano Convention aims to determine the international jurisdiction and to facilitate recognition and enforcement of judgments among the Member States of the EU and the EFTA.[165] It also fully excludes arbitration from the scope of its application[166]. Many provisions are identically presented in both treaties.[167] This is, for example, the case for the lis pendens principle.[168] The uniform interpretation of the Lugano Convention and the Brussels I Regulation is secured by a protocol annexed to the Lugano Convention.[169] Therefore, Swiss courts, while applying the Lugano Convention, have to account for judgments rendered by the ECJ.[170]

---

[162] The Convention on jurisdiction and the enforcement of judgments in Civil and Commercial Matters 2007 SR 0.275.12 (Lugano Convention). Available at http://www.bj.admin.ch/content/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugue2007.html (last accessed 15 June 2011).

[163] Walter G *Internationales Zivilprozessrecht der Schweiz* 2ed (1998) 158.

[164] The Convention on jurisdiction and the enforcement of judgments in Civil and Commercial Matters 1988 SR 0.275.11 (replaced Lugano Convention). Available at http://www.bj.admin.ch/content/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugue2007/lugue1988.html (last accessed 15 June 2011).

[165] Walter G op cit 161.

[166] Lugano Convention op cit art 1(2)(d).

[167] Reuland RC op cit at 570.

[168] Lugano Convention op cit art 27.

[169] Lugano Convention op cit protocol no 2.

[170] Lugano Convention op cit protocol no 2 art 1.

Since the United Kingdom is a Member of the EU, it has to observe the EU's rules and regulations, such as the Brussels I Regulation. English judges could therefore not apply procedural means contradicting EU law. This of course raises questions as to how strictly the lis pendens principle has to be applied, and generally on its interpretation. A strict interpretation and application of the lis pendens principle leads to the consequence that the Brussels/Lugano Regime exclusively provides the procedural steps to be taken in parallel proceedings[175] which deprives the Member States of any alternative possibilities to deal with parallel proceedings, so that there is no room for individual solutions such as an anti-suit injunction.

Furthermore, the principle of mutual trust on which the Brussels Convention and the Brussels I Regulation are based, seems to leave no field of application for anti-suit injunctions indirectly foreclosing another court to decide on its own jurisdiction. Restraining orders may well give the impression that the issuing court considers itself to be better suited to reach the right conclusion with regard to jurisdiction, rather than any other court, and are thus superior to the courts of other Member States. This does in fact not only contradict the principle of mutual trust, but denies the equality of the courts of the Member States.

The ECJ's case law, prior to the *West Tankers* decision, clearly shows a negative approach towards anti-suit injunctions based on the lis pendens principle and the mutual trust concept, meaning English judges were already confronted with a much reduced field of application.[176] However, the exclusion of arbitration from the scope of the Brussels/Lugano Regime, as well as the ECJ's former jurisdiction in respect of the extent to which arbitration was excluded raised hope that anti-suit injunctions still have an area of application.

2. FACTS OF THE *WEST TANKERS* DECISION

In August 2000, a collision between a vessel called Front Comor, owned by West Tankers Inc., and a jetty took place in the port of Syracuse (Italy).[177] The vessel was chartered by Erg Petroli SpA ('Erg'), an Italian oil refinery

[175] Hueske W op cit at 435.
[176] See below s IV/4.
[177] *West Tankers* decision op cit para 9.

company.[178] The governing law of the charter party was English law and the parties agreed upon an arbitration clause, which provided for arbitration in London.[179] The collision damaged the jetty owned by Erg.

Erg was insured by an Italian company called RAS Riunione Adriatica di Sicurtà SpA (thereafter "RAS"), and Generali Assicurazioni Generali SpA (thereafter "Generali") from which it asked for compensation of the damages under its insurance cover.[180] RAS and Generali paid for the damages.[181] At the same time, pursuant to the terms of the charter party, Erg started arbitration proceedings against West Tankers in London for its uncovered losses.[182] West Tankers filed a counterclaim contesting its liability for the damage the collision with the jetty had caused.[183]

Beyond that, RAS and Generali started a tort action against West Tankers before the Tribunale di Syracusa in Italy, to recover the sum paid to Erg under the insurance.[184] According to art 1916 of the Italian Civil Code[185], this claim devolved from Erg to the insurers.[186] The insurers considered the jurisdiction of the Italian courts as given based on art 5(3) of the Brussels I Regulation, subject to a stay of proceedings according to the New York Convention, to which Italy was a signatory state.[187] West Tankers, in return, submitted an application to the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court) asking, amongst others, for the grant of an anti-suit injunction to prevent the insurers from taking any further steps with regard to the dispute, other than by way of arbitration in London in accordance with the charter party.[188]

In the first instance, the English High Court ruled in favour of West Tankers and granted the anti-suit injunction.[189] Both insurers appealed against this

---

[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] *West Tankers* decision op cit para 10.
[182] Ibid.
[183] Ibid.
[184] *West Tankers* decision op cit para 11.
[185] Italian Civil Code 1942. Available at http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/codciv.htm (last acessed 17 July 2011).
[186] *West Tankers* decision op cit para 11.
[187] *West Tankers* decision op cit para 28..
[188] *West Tankers* decision op cit para 12.
[189] *West Tankers* decision op cit para 13.

decision arguing that such an injunction was in contradiction to the Brussels I Regulation.[190]

3. HOUSE OF LORDS' ARGUMENTATION[191]

The House of Lords, as appellate court, first referred to the ECJ's former jurisdiction in *Gasser GmbH v MISAT Srl* (thereafter *"Gasser v MISAT"*[192] and *Turner v Grovit* (thereafter *"Turner v Grovit"*) [193], stating that the ECJ held that an injunction preventing a party from commencing or continuing proceedings in a court of a Member State based on an exclusive jurisdiction clause is incompatible with the Brussels I Regulation. The Brussels I Regulation implemented a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States, which must trust each other to adopt those rules correctly.[194] An anti-suit injunction would therefore contradict the mutual trust principle. With reference to the present case, the House of Lords held that the principle of mutual trust could not be extended to arbitration since the Brussels I Regulation explicitly exempts arbitration in its art 1(2)(d).[195] According to the House of Lords, the Brussels I Regulation's allocation of jurisdiction, whose key factor for conferring jurisdiction was the domicile of the respondent, was above all not right for the purpose of international arbitration in which the parties base the choice of the place of arbitration and the governing law on neutrality, the availability of legal services and a contained and effective supervisory jurisdiction.[196] Since there was no set of uniform community rules applying in arbitration, the necessary condition that mutual trust between the courts of the Member States may be established and applied was not given.[197]

In this regard, the House of Lords referred to *Marc Rich & Co AG v Società Italiana Impianti PA* (thereafter "*The Atlantic Emperor*")[198] and *Van Uden*

---

[190] *West Tankers* decision op cit para 13.
[191] *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA and Others* (2007) UKHL 4 Session 2006-07 (thereafter "*House of Lords'* decision").
[192] *(Case C-116/02)* [2003] ECR I-14693 (thereafter "*Gasser v MISAT*").
[193] *(Case C-159/02)* [2004] ECR I – 3565 (thereafter "*Turner v Grovit*").
[194] *House of Lords'* decision op cit para 10.
[195] *House of Lords'* decision op cit para 12.
[196] Ibid.
[197] Ibid.
[198] (C-190/89) [1991] ECR I-3855 (thereafter "*The Atlantic Emperor*").

Maritime BV v Deco-Line (thereafter "*Van Uden v Deco-Line*")[199] in which the ECJ held that the arbitration exclusion of the Brussels I Regulation included court proceedings whose subject-matter was arbitration and that the subject-matter of such proceedings is arbitration if the proceedings are aimed at the protection of the right to have the dispute determined by arbitration.[200] Applying those criteria to the present case, the House of Lords found that the English proceedings served to protect the contractual right to have the dispute determined by arbitration[201], and hence were not covered by the scope of the Brussels I Regulation. In their opinion, the Italian court had jurisdiction under the Brussels I Regulation over the tort-based claim, but the English restraining order headed for the performance of the arbitration clause in the charter party, which served the purpose not to invoke the Italian court's jurisdiction.[202] The House of Lords abolished the contrary argument that a conflict with the Brussels I Regulation was given whenever a party was restrained from instituting or continuing proceedings for which a Member State court had jurisdiction under the Brussels I Regulation, even when the restraining order was issued in proceedings not covered by the Brussels I Regulation, since such an order would indirectly interfere with the jurisdiction of that other court.[203]

The most important argument of the House of Lords was the practical reality of arbitration as a method of resolving commercial disputes.[204] In their view, it was a valuable tool for the court of the seat of arbitration exercising supervisory jurisdiction over the arbitration, as it promoted legal certainty and reduced the possibility of conflict between the arbitration award and the judgment of a national court.[205] They also found that it was the free choice of the parties to conclude an arbitration agreement and that such party autonomy should be respected. Thus, in any disputes not covered by the Brussels I Regulation, the Member States should leave the decision of the validity of the arbitration agreement to the arbitrators or the courts at the

---

[199] (C-391/95) [1998] ECR I-7091 (thereafter "*Van Uden v Deco-Line*").
[200] *House of Lords'* decision op cit para 13.
[201] *House of Lords'* decision op cit para 14.
[202] Ibid.
[203] Ibid.
[204] *House of Lords'* decision op cit para 17.
[205] Ibid.

seat of arbitration equally trusting them under the doctrine of Kompetenz-Kompetenz.[206]

The House of Lords finally raised the argument that if such a legal instrument was also practiced by the courts in other Member States, then the European Community would be more competitive, compared to other international arbitration centres such as New York, Bermuda and Singapore.[207]

4. INFLUENCE OF PREVIOUS JURISDICTION OF THE ECJ

4.1. *Gasser v MISAT*[208]

The decision in *Gasser v MISAT* was not concerned with the issue of anti-suit injunctions, but to determine the application of the lis pendens principle in any circumstance.

The two parties involved, one in Austria and the other in Rome, concluded an agreement which contained, amongst other provisions, an exclusive jurisdiction clause in favour of the Austrian courts in case of any contractual dispute.[209] Nevertheless, MISAT started legal proceedings in an Italian court, whereupon Gasser filed a lawsuit with the agreed Austrian court.[210] The Austrian court stayed its proceedings applying the lis pendens principle, since the claim in Italy was already pending.[211] Due to the fact that the parties agreed on an exclusive jurisdiction clause, and that the Italian courts notoriously take very long to render decisions, the Austrian court addressed the question to the ECJ as to whether the lis pendens principle according to art 21 of the Brussels Convention was absolute and had to be applied even under the given circumstances.[212]

The ECJ ruled that the court first seized of a dispute must always decide on its jurisdiction first, meanwhile the court second seized has to stay proceedings absolutely independently of any given circumstances, since the lis pendens principle factors only the chronological order in which the courts

---

[206] *House of Lords'* decision op cit para 20.
[207] *House of Lords'* decision op cit para 21.
[208] *Gasser v MISAT* op cit.
[209] *Gasser v MISAT* op cit para 13 et seq.
[210] *Gasser v MISAT* op cit para 12.
[211] *Gasser v MISAT* op cit para 15.
[212] *Gasser v MISAT* op cit para 20.

are seized in.[213] The ECJ stated that even the fact that a party institutes legal proceedings before a court obviously lacking jurisdiction, and therefore acting with the intention of delaying the settlement of the substantive dispute, does not justify any other interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose[214].

In *Gasser v MISAT*, the ECJ also referred to the trust of the Member States in each other's legal systems and judicial institutions on which the Brussels Convention is based on.[215]

4.2. *Turner v Grovit*[216]

In *Turner v Grovit*, the national English court referred to the ECJ for a preliminary ruling on the question as to whether the Brussels Convention allows a court of a Member State to grant an anti-suit injunction to prevent a party from commencing or continuing proceedings before a court in another Member State, even where that party is acting in bad faith to frustrate the existing proceedings.[217]

The ECJ touched again on the principle of mutual trust, which would require that the interpretation and application of the rules on jurisdiction provided by the Brussels Convention might be interpreted and applied with the same authority by each of the courts of the Member States.[218] An anti-suit injunction would therefore infringe the mutual trust principle, since it interdicts a party to start or continue proceedings before a foreign court on pain of penalties, which disrespects the foreign court's jurisdiction to determine the dispute.[219] The principle is in addition reflected when it comes to recognition and enforcement of judgments of Member States, as the jurisdiction of the court of the Member State of origin may not be reviewed, except in special circumstances.[220] The issuance of an anti-suit injunction due to an abuse of process would always imply an assessment of the appropriate-

---

[213] *Gasser v MISAT* op cit para 54.
[214] *Gasser v MISAT* op cit para 53.
[215] *Gasser v MISAT* op cit para 72.
[216] *Turner v Grovit* (n 193).
[217] *Turner v Grovit* (n 193) para 19.
[218] *Turner v Grovit* (n 193) para 25.
[219] *Turner v Grovit* (n 193) para 27.
[220] Brussels Convention op cit art 28.

ness of bringing proceedings before a court of another Member State.[221] However, such an assessment would undermine the principle of mutual trust being the foundation of the Brussels Convention.[222]

4.3. *The Atlantic Emperor*[223]

The *Atlantic Emperor* was concerned with the extent to which the Brussels Convention excludes arbitration. Societa Italiana Impianti refused to appoint an arbitrator to impede the constitution of the arbitral tribunal with its seat in London.[224] Marc Rich & Co AG therefore commenced proceedings before the High Court of Justice in London for the appointment of an arbitrator. Societa Italiana Impianti contested the jurisdiction of the court in London, arguing that the Brussels Convention was applicable since its art 1(2)(4) does not include proceedings before national courts and that the Italian courts would have to appoint the arbitrator according to art 2 of the Brussels Convention.[225]

In this respect, the ECJ had to decide whether the scope of the Brussels Convention covered a court action regarding the appointment of an arbitrator and, in the affirmative, whether the decision of the preliminary issue regarding the existence and validity of the arbitration agreement brought up in the same court action was also covered.[226]

The ECJ ruled that the Brussels Convention excludes arbitration in its entirety since it was already administered by international conventions.[227] Furthermore, it held that 'the appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion' and that 'such a measure therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in art 1(2)(4) of the Convention'[228]. It further ruled that only the matter in dispute decided whether the Brussels Convention covers such a dispute, and if the matter in dispute as such was not covered by its scope then any pre-

---

[221] Ibid.
[222] *Turner v Grovit* (n 193) para 28.
[223] *The Atlantic Emperor* op cit.
[224] *The Atlantic Emperor* op cit para 6.
[225] *The Atlantic Emperor* op cit para 7.
[226] *The Atlantic Emperor* op cit para 11.
[227] *The Atlantic Emperor* op cit para 18.
[228] *The Atlantic Emperor* op cit para 19.

liminary issue to be decided for the determination of the dispute could not justify the application of the Brussels Convention.[229] Therefore, the appointment of an arbitrator, falling under the arbitration exclusion of the Brussels Convention, was not covered by the latter.[230]

4.4. *Van Uden v Deco-Line*[231]

In *Van Uden v Deco-Line*, the claimant commenced arbitration proceedings based on the arbitration agreement in the business contract with Deco-Line for unpaid debt, and additionally applied to the national court for an interim injunction with regard to the same debts due under the business contract.[232] According to art 24 of the Brussels Convention (corresponding to art 31 of the Brussels I Regulation) an application for provisional measures may be made to the courts of a Contracting State as may be available under the law of that State, even if, under the Brussels Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter. Jurisdiction in this case was contested based on the fact that the principle proceedings were subject to an arbitration agreement, so that art 24 of the Brussels Convention was not applicable.

With respect to the court proceedings for the interim injunction, one of the questions referred to the ECJ was if the existence of an arbitration agreement has the effect of excluding an application for interim measures from the scope of the Brussels Convention.[233]

The ECJ stated that an interim measure is in general not ancillary, but parallel to arbitration proceedings depending on its subject-matter.[234] If that subject-matter falls within the scope of the Brussels Convention, art 24 would apply, provided that there was a real connection between the subject-matter of the applied provisional measures and the territorial jurisdiction of the court seized for such measures. Furthermore, the ECJ determined that proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration

---

[229] *The Atlantic Emperor* op cit para 26.
[230] *The Atlantic Emperor* op cit para 29.
[231] *Van Uden v Deco-Line* op cit.
[232] *Van Uden v Deco-Line* op cit para 9 et seq.
[233] *Van Uden v Deco-Line* op cit para 17.
[234] *Van Uden v Deco-Line* op cit para 33 et seq.

or the extension of the time-limit for making awards, falls outside of the scope of the Brussels Regulation.[235] The ECJ finally decided that the interim measure applied for in *Van Uden v Deco-Line* was parallel to the arbitration proceedings, and so was not covered by the arbitration exception.

4.5. Appraisal of the Previous Jurisdiction of the ECJ

None of the decisions discussed above were explicitly concerned with anti-suit injunctions in connection with arbitration, but they all had their influence on the outcome of *West Tankers.*

The ruling in *Gasser v MISAT* made clear that even in the case of an exclusive jurisdiction agreement there is no use of a means such as an anti-suit injunction. Since a party would most likely file for an anti-suit injunction when a lawsuit was already pending in a court other than the one agreed on, that court second seized issuing an anti-suit injunction instead of staying proceedings would, in doing so, always infringe the lis pendens principle interpreted in that rigid way. The decision wholly embodies that it only matters how fast a party institutes legal proceedings when a dispute first arises. As a consequence, parties might be reluctant to negotiate a private settlement and start legal proceedings right away, which further burden the often already overloaded courts. *Gasser v MISAT* already curtailed the possibility to largely use anti-suit injunctions and showed the negative approach of the ECJ towards that procedural tool.

The same is true for *Turner v Grovit* where the ECJ directly linked the incompatibility of anti-suit injunctions and the concept of mutual trust on which the Brussels Convention is based. As rightly described, the concept of mutual trust, as pointed out by the ECJ, almost amounts to blind faith in the decisions and judgments of a foreign court and goes far beyond the concept of comity of nation.[236]

The *Atlantic Emperor* and *Van Uden v Deco-Line* were both relevant since they further interpreted and clarified the scope of the arbitration exception and the relationship between arbitral and state court proceedings. The statement that arbitration is excluded in its entirety, including ancillary is-

---

[235] *Van Uden v Deco-Line* op cit para 32.
[236] Hueske W op cit at 435.

sues in connection with arbitral proceedings brought up before national courts, raised hope that there may still be a field of application for anti-suit injunctions. Although it must be considered that the ECJ could not come to any other conclusion in the *Atlantic Emperor*, as the Brussels Convention does not contain any provisions regarding the allocation of jurisdiction for proceedings such as the dismissal or appointment of arbitrators.[237] Overall, the ECJ was unable to give a general definition and the scope of ancillary proceedings as opposed to parallel proceedings. This left the question open as to whether state court proceedings regarding the issue of an anti-suit injunction in disputes which the parties made subject to arbitration are also ancillary proceedings and thus are excluded from the scope of the Brussels I Regulation.[238] However, some commentators believe that it can be concluded from the *Atlantic Emperor* that anti-suit injunction proceedings supporting an arbitration agreement are not covered by the arbitration exception, and are thus falling within the scope of the Brussels I Regulation.[239]

5. THE QUESTION REFERRED TO THE ECJ IN WEST TANKERS

Therefore, it does not come as a surprise that the House of Lords, in the *West Tankers* Decision, finally referred the following question for a preliminary ruling to the ECJ:

'Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?'[240]

6. OPINION OF THE ADVOCATE GENERAL KOKOTT

In the forefront of the ECJ's final decision, Advocate General Kokott delivered a detailed opinion on 4 September 2008, dealing with all the argu-

---

[237] Illmer M Naumann I 'Yet another blow: Anti-suit injunctions in support of arbitration agreements within the European Union (2007) *10(5) International Arbitration Law Review 147* at 149.
[238] Ibid.
[239] Ibid.
[240] *West Tankers* decision op cit para 18.

ments brought forward by the House of Lords.[241] Since the reasoning of the ECJ in the judgment itself was rather moderate and referred constantly to the opinion given by the Advocate General, her reasoning will be highlighted first.

The Advocate General stated that according to the previous jurisdiction of the ECJ the courts of one Member State could not issue an anti-suit injunction to restrain legal proceedings already pending in the courts of another Member State.[242] Although it remained unclear if this would be the case with regard to arbitration proceedings, as the Brussels I Regulation deals primarily with the recognition and enforcement of judgments from one Member State in another Member State, and explicitly excludes arbitration.

She agreed with the House of Lords that the statements in the ECJ's previous case law in *Turner v Grovit* based on the Brussels Convention, could generally be applied in cases in which ratione temporis the Brussels I Regulation was applicable, since the Brussels I Regulation was intended as an update of the Brussels Convention and not implementing any change of structure or basic principles.[243]

The Advocate General first altercated with the exclusion of arbitration from the scope of the Brussels I Regulation, and held that it was firstly important to assess in relation to which proceedings, i.e. the court proceedings in England or in Italy, the scope of application of the Brussels I Regulation had to be determined.[244]

She contradicted the House of Lords argumentation that the *Turner v Grovit* case could not be applied as it was not related to arbitral proceedings, whereas the issue of an anti-suit injunction in the present proceedings in England fell within the arbitration exception, so that the Brussels I Regulation was not applicable and therefore not infringed.[245] The Advocate General saw the proceedings before the state court in Italy and the implications of a restraining order thereon as the determining factors, and not the Eng-

---

[241] *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc*, (C-185/07) [2008] ECR I-663, (thereafter "*Opinion Kokott*").
[242] *Turner v Grovit* (N 193); *Gasser v MISAT* op cit.
[243] *Opinion Kokott* op cit para 28.
[244] *Opinion Kokott* op cit para 31.
[245] *Opinion Kokott* op cit para 32.

lish proceedings. She further stated that *Turner v Grovit* explicitly emphasized that the anti-suit injunction violated the Brussels Convention due to its implications on the foreign proceedings, even under the assumption that it was a procedural measure and therefore a matter of state law only.[246]

Thus the Advocate General considered that the decisive question in determining whether or not the arbitration exception applied was not:

'Whether the application for an anti-suit injunction --in this case the proceedings before the English courts--falls within the scope of application of the Regulation' but rather, 'whether the proceedings against which the anti-suit injunction is directed - the proceedings before the court in Syracuse - do so'.[247]

Furthermore, she stated that the violation of the principle of mutual trust in *Turner v Grovit* does not require that the proceedings regarding the issue of an anti-suit injunction, and the foreign proceedings which would be barred by that injunction, be covered by the scope of the Brussels I Regulation. The principle of mutual trust could even be violated by a decision outside of the scope of the Brussels I Regulation, when as a consequence such decision would impair the court of another Member State from exercising its competence under the Brussels I Regulation[248] since procedural state law must not interfere with the Brussels I Regulation, and hinder its effectiveness.[249] Applying *Turner v Grovit* led her again to the conclusion that it had to be determined if the Brussels I Regulation applied to the proceedings against which the anti-suit injunction was addressed, i.e. the proceedings in Italy.[250]

To answer that question, the Advocate General turned to the definition of arbitration in the sense of art 1(2)(d) of the Brussels I Regulation, adverting to the dispute of the Anglo-Saxon and the continental European scholars, as to what extent arbitration should be excluded.[251] On the one hand, the Anglo-Saxon school of law wanted a broad interpretation of arbitration

---

[246] *Opinion Kokott* op cit para 33.
[247] Ibid.
[248] *Opinion Kokott* op cit para 34.
[249] *Opinion Kokott* op cit para 36.
[250] *Opinion Kokott* op cit para 37.
[251] *Opinion Kokott* op cit para 33.

meaning that state courts, apart from the state court at the seat of arbitration, were completely excluded whenever the settlement of a dispute was contractually referred to arbitration, and that the exclusion also stretches out over secondary disputes connected with that initial dispute.[252] On the other hand, the continental European scholars see state courts proceedings only as a part of arbitration and therefore excluded, when they refer to arbitration proceedings, 'whether concluded, in progress or to be started'.[253] This controversy was not just a theoretical one, according to the Advocate General, as it had an impact on the allocation of jurisdiction with regard to the examination of the effectiveness and scope of the arbitration agreement.[254] Furthermore, a Member State following the Anglo-Saxon approach could refuse the recognition and enforcement of judgments given in disrespect of an arbitration agreement.[255]

The House of Lords - following the Anglo-Saxon approach - were of the opinion that only the arbitral tribunal and the national courts at the seat of arbitration in London have jurisdiction to answer that question, but not the courts in Italy. Consequently, an anti-suit injunction was issued on the grounds that the dispute before the English courts arose from the charter party and that the insurers were also subject to the arbitration agreement, since they subrogated to the insured's rights under the charter party.[256]

The Advocate General then applied the two approaches on the present case. She agreed with the House of Lords that the Anglo-Saxon approach would not determine the subject-matter of the Italian dispute, but only if this dispute was covered by an arbitration agreement. As this was true for the present case, only the arbitral tribunal and the courts at the seat of the tribunal would have jurisdiction according to the Anglo-Saxon approach.[257]

Following the continental European approach, it would first be assessed whether the claim for damages was covered by the scope of the Brussels I Regulation, and secondly if it foresees a legal venue in Italy.[258] If these

---

[252] *Opinion Kokott* op cit para 39.
[253] Ibid.
[254] *Opinion Kokott* op cit para 40.
[255] Ibid.
[256] *Opinion Kokott* op cit para 41.
[257] *Opinion Kokott* op cit para 43.
[258] *Opinion Kokott* op cit para 42.

questions could be answered in the affirmative, the court would be entitled to examine whether the arbitration exception applies and whether the arbitration agreement was valid in case of an objection of lack of jurisdiction.[259] Under the prevailing circumstances, the court had to refer the parties to arbitration according to the New York Convention.[260]

Since the wording of the Brussels I Regulation did not give any guidance on the interpretation of the arbitration exclusion, the Advocate General referred to the Schlosser[261] and the Evrigenis and Kerameus[262] Report, and the ECJ's previous jurisdiction in the *Atlantic Emperor* and *Van Uden v Deco-Line*. In Schlosser's view, the former Brussels Convention did not only exclude ancillary court proceedings, such as the appointment or dismissal of arbitrators or the fixing of the place of arbitration a judgment, but also 'a judgment determining whether an arbitration agreement is valid or not, or because it is invalid ordering the parties not to continue the arbitration proceedings'[263]. As opposed to that, the Evrigenis and Kerameus Report excludes court proceedings 'which are directly concerned with arbitration as the principal issue', so that the court is therefore instrumental for the arbitral proceedings[264], but includes proceedings whose subject is to incidentally verify the validity of an arbitration agreement invoked by a litigant to object to the jurisdiction of that court.[265] Referring to the ECJ's previous jurisdiction, the Advocate General ascertained that in the *Atlantic Emperor* the ECJ had differentiated between the subject-matter and preliminary issues of legal proceedings and had concluded that the Brussels Convention cannot be applicable on a preliminary issue, in a dispute that itself falls outside the scope of the Brussels Convention by reason of its subject-matter.[266] In her

---

[259] Ibid.
[260] New York Convention op cit art 2(3).
[261] Schlosser P "Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice" (1979) OJ C 59/71. Available at http://aei.pitt.edu/1467/ (accessed 12 February 2011).
[262] Evrigenis D I Kerameus K D "Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial Matters" (1986) OJ C 298/1. Available at http://aei.pitt.edu/5623/ (accessed 12 February 2011).
[263] Schlosser P op cit para 65.
[264] Evrigenis D I Kerameus K D op cit para 35.
[265] Ibid.
[266] *The Atlantic Emperor* op cit para 26.

opinion, in *Van Uden v Deco-Line,* the ECJ again pointed out that the *substantive* subject-matter of a dispute is decisive to answer the question of whether or not it falls under the arbitration exclusion.[267] Consequently, she held that this decision could not be interpreted in the way that preliminary issues, such as the examination of the existence of an effective arbitration agreement covering the subject-matter of the dispute, were eliminated from the jurisdiction of state courts.[268]

The Advocate General determined the subject-matter of the proceedings before the courts in Italy as a claim in tort or possibly in contract, but certainly not in arbitration. The Brussels I Regulation provides for the allocation of jurisdiction in contractual[269] as well as tort-based[270] claims, so that the claim before the Italian courts was therefore within its scope.[271] Furthermore, she held that the 'existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seized must address when examining whether it has jurisdiction'[272] and that such preliminary issue could not change the subject-matter of the dispute.

She further referred to the decision in *Gasser* v *MISAT,* where the conclusion could be drawn that every court is entitled to assess its own jurisdiction according to the doctrine of Kompetenz-Kompetenz, particularly when first seized, even if there was an alleged exclusive jurisdiction clause referring to the subject-matter of the dispute to the court second seized. She held that the same principle applied in case of an alleged arbitration agreement referring to the subject-matter of the dispute to arbitration.[273] In her opinion, such examination of jurisdiction would also comprise the examination of the validity and scope of such agreement put forward as a preliminary issue.[274] If that would not be the case, then any party could avert state court proceedings by alleging that the parties concluded an arbitration agreement in respect of that dispute.[275] It was also no longer possible for a party to insti-

---

[267] *Van Uden v Deco-Line* op cit para 33 et seq.
[268] *Opinion Kokott* op cit para 59 et seq.
[269] Brussels I Regulation op cit art 5(1).
[270] Brussels I Regulation op cit art 5(3).
[271] *Opinion Kokott* op cit para 53.
[272] *Opinion Kokott* op cit para 38.
[273] *Opinion Kokott* op cit para 57.
[274] *Opinion Kokott* op cit para 58.
[275] Ibid.

tute legal proceedings before a state court, being of the opinion that an arbitral agreement was invalid or inapplicable, since the state court would not be entitled to assess the invalidity or inapplicability of such agreement.[276] She concluded that this would amount to a violation of the principle of effet utile, which was a general principle of Community law and one of the fundamental rights protected in the Community.[277]

According to the Advocate General, the New York Convention stipulated the same procedure. Whenever a state court's jurisdiction was contested on the basis of an arbitration agreement, the state court had the right to examine whether the subject-matter of a claim can be subject to arbitration under its national law, i.e. is it arbitral at all, whether the parties concluded an arbitration agreement in that matter the court is seized with, and whether or not the arbitration agreement is null and void, inoperative or incapable of being performed.[278] She stated that under the New York Convention, every court was entitled to assess these conditions, not only the arbitral tribunal or the state court at the seat of the arbitral tribunal. In her opinion, the scope of the Brussels I Regulation need not be limited further as what was provided for in the New York Convention since arbitration was excluded from the Brussels I Regulation solely to avoid any interference with the application of the New York Convention.[279]

Finally, the Advocate General found that the existence of an arbitration agreement did not yet exclude the legal relationship subject to that agreement from the Brussels I Regulation, which had to be applied depending on the substantive subject-matter. Furthermore, she determined that the preliminary issue of the existence of a valid and applicable arbitration agreement, to be addressed by the court seized, was a separate issue. As a conclusion, 'an anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation'.[280]

---

[276] Ibid.
[277] Ibid.
[278] *Opinion Kokott* op cit para 55.
[279] *Opinion Kokott* op cit para 56.
[280] *Opinion Kokott* op cit para 62.

The Advocate General then turned to the argument of the House of Lords[281] regarding the practical reality of arbitration.[282] The Advocate General emphasized that simple economic reasons would not justify a violation of Community law[283]. Furthermore, the interpretation of the Brussels I Regulation given would account for individual autonomy of the parties as well as for the respect for the international rules on arbitration.[284] State court proceedings in a matter referred to arbitration, would only take place if one of the parties were of the opinion that the arbitration agreement was not valid or applicable, so that the parties' consensus with respect to the dispute submitted to arbitration was not established[285] and the individual autonomy of the parties would not be disrespected. Furthermore, since a state court, due to the New York Convention, had to refer the parties to arbitration, in case the arbitration agreement was valid and applicable and arbitration could not be circumvented.[286] Moreover, she pointed out that the issue of an anti-suit injunction might lead to an arbitral award whose recognition and enforcement under the New York Convention[287] could later be rejected by a state court, in case that court considers the respective claim brought before an arbitral tribunal should have been brought before a state court instead, according to the Brussels I Regulation.

The Advocate General then pointed out that it was possible under the current legislation that both, a state court competent, according to the Brussels I Regulation, and an arbitral tribunal set in motion due to an arbitration agreement, could be seized and thus could come to divergent decisions regarding the validity and applicability of the arbitration agreement. If both of them draw the conclusion to have jurisdiction, two conflicting decisions on the merits could result, which should be avoided as far as possible.

Nevertheless, she did not consider the issue of a unilateral anti-suit injunction as a suitable solution, in particular since other state courts could follow the English example and also impose anti-suit injunctions. In the end, the

---

[281] See above s IV/6.
[282] *Opinion Kokott* op cit para 63.
[283] *Opinion Kokott* op cit para 66.
[284] *Opinion Kokott* op cit para 67.
[285] Ibid.
[286] *Opinion Kokott* op cit para 68.
[287] New York Convention op cit art 5.

jurisdiction implementing the highest sanctions for contempt of court order will triumph.[288]

Finally, on the basis of all these considerations, the Advocate General was of the opinion that the issue of an anti-suit injunction in the present case was not compatible with the Brussels I Regulation.[289]

7. THE ECJ'S REASONING AND DECISION[290]

As in the House of Lords' decision and in the opinion of the Advocate General, the ECJ highlighted the relevant legal framework to be applied[291] and gave a résumé of the facts of the case.[292] It then briefly listed the arguments of the House of Lords again.[293]

Referring to the *Atlantic Emperor* and *Van Uden v MISAT*, the ECJ held that only the subject-matter of the dispute was decisive in order to determine if it was covered by the scope of the Brussels I Regulation, whereas the subject-matter was defined by the nature of the rights which protection was pursued by these proceedings.[294] According to the ECJ, the English proceedings concerning the issue of an anti-suit injunction could therefore not fall within the scope of the Brussels I Regulation.[295] Nevertheless, the purpose of the Brussels I Regulation could still be negatively affected in cases where these proceedings would hinder a court of another Member State to exercise its jurisdictional authority, as provided for in the Brussels I Regulation.[296] Thus, consistent with the Advocate General's opinion, the ECJ held that it had to determine whether the subject-matter of the Italian proceedings was covered by the Brussels I Regulation and if so, how the anti-suit injunction would affect these proceedings.[297]

The ECJ then confirmed the Advocate General, stating that if the subject-matter of a dispute, i.e. the nature of the rights to be protected in proceed-

---

[288] *Opinion Kokott* op cit para 72.
[289] *Opinion Kokott* op cit para 74.
[290] *West Tankers* decision op cit.
[291] *West Tankers* decision op cit para 3 et seqs.
[292] *West Tankers* decision op cit para 9 et seqs.
[293] See above s IV/3.
[294] *West Tankers* decision op cit para 22.
[295] *West Tankers* decision op cit para 23.
[296] *West Tankers* decision op cit para 24.
[297] *West Tankers* decision op cit para 25.

ings, came within the scope of the Brussels I Regulation, an incidental question in connection with that dispute such as the validity and applicability of an alleged arbitration agreement was also covered by the latter.[298] Furthermore, the ECJ pointed to the Evrigenis and Kerameus Report, which confirmed this interpretation of the arbitration exclusion.[299] West Tankers based its objection of lack of jurisdiction of the Italian court on the existence of an arbitration agreement between the parties.[300] Since the Italian court generally had jurisdictional authority, according to the Brussels I Regulation due to the contractual or tort-based nature of the claims, it also had the authority to incidentally examine the validity and applicability of the alleged arbitration agreement in order to be able to finally conclude on its jurisdiction.[301] The issue of an anti-suit injunction in the English proceedings, even if not directly addressed to the Italian court, would foreclose the latter to do so.[302]

The ECJ held that an anti-suit injunction also contradicted the Kompetenz-Kompetenz doctrine[303], which was elsewhere mirrored in the Brussels I Regulation's recognition and enforcement proceedings, which did not allow for a review of the Member State's court jurisdiction in the main proceedings except for a few exceptions. According to the ECJ, the Brussels I Regulation directly defined the jurisdiction of a Member State's court in a dispute, so that the courts of a Member State are on a par applying those rules, and no court of a Member State was in a better position to decide on the other court's jurisdiction.[304]

The ECJ also pointed out that an anti-suit injunction would deny the principle of mutual trust which the Brussels I Regulation was based on.[305] Finally, the ECJ added that if a Member State's court could not assess preliminary issues concerning its jurisdiction, a party was able to avoid state court proceedings solely through the objection of a lack of jurisdiction based on an arbitration agreement. Thus, access to the court was no longer guaranteed

---

[298] *West Tankers* decision op cit para 26.
[299] Ibid.
[300] *West Tankers* decision op cit para 27.
[301] Ibid.
[302] *West Tankers* decision op cit para 28.
[303] *West Tankers* decision op cit para 29.
[304] Ibid.
[305] *West Tankers* decision op cit para 30.

and the counterparty would lose a form of judicial protection to which it was entitled to according to the Brussels I Regulation.[306] The ECJ then mentioned that the New York Convention also confirmed this conclusion.[307]

The ECJ concluded, based on its considerations that the question referred to by the House of Lords was in the negative and that anti-suit injunctions in support of an arbitration agreement were not compatible with the Brussels I Regulation.

8. CRITICAL ASSESSMENT OF THE WEST TANKERS DECISION AND ITS REASONING

8.1. Relevance of the Italian and English Proceedings

The House of Lords' argument focussed only on the English proceedings in order to determine whether the subject-matter lies within the scope of the Brussels I Regulation, whereas the ECJ found that the impact of the English proceedings on the Italian proceedings have to be taken into account and finally determined the Italian proceedings as relevant alone. Both the ECJ and the House of Lords agreed insofar as they considered the English proceedings concerning arbitration as outside, and the Italian proceedings concerning a tort claim as inside of the scope of application. The disagreement lay within the fact that, according to the ECJ, any restraining order preventing a party from invoking a jurisdiction provided for by the Brussels I Regulation would infringe the latter, at least indirectly, whereas the House of Lords – referring to Schlosser[308] - abolished this argument as divorced from reality. The reasoning of the ECJ referred to the effet utile, i.e. the principle of effective judicial protection, which the Brussels I Regulation is based on and which was, in its opinion, undermined by a restraining order since the right of access to courts would not be guaranteed anymore.[309]

Therefore, in my opinion, the ECJ in fact gave its reasoning as to why the subject-matter of the Italian proceedings was relevant[310], but failed to explain why the subject-matter of the English proceedings could entirely be

---

[306] *West Tankers* decision op cit para 31.
[307] *West Tankers* decision op cit para 33.
[308] Schlosser P 'Anti-suit injunctions zur Unterstützung von internationalen Schiedsvereinbarungen' (2006) *Heft 7 Zeitschrift für Wirtschaftsrecht 486* at 489.
[309] See below s IV/8/8.2.
[310] See below s IV/8/8.1.

disregarded, in particular because it was considered to be outside the scope.

In my opinion, both proceedings are closely related and the focus cannot just lie on one of them. In this connection, attention has to be drawn to the fact that English anti-suit injunction proceedings could have been invoked even if proceedings abroad were not yet instituted. English courts may grant anti-suit injunctions restraining foreign proceedings in general.[311] In such cases, the argumentation of the ECJ would fall short under the aspects: a) that there was no state court involved (yet), b) that it was not even sure if there ever would be and c) one could only guess on what grounds/subject-matter the party in alleged breach of the arbitration agreement would base such claim. But the allocation of jurisdiction according to the Brussels I Regulation often depends on the subject-matter of the claim, apart from the main principle that a party domiciled in a Member State shall be sued in the courts of that Member State.[312] Consequently, the jurisdiction of a Member State court could not be assessed (or at most in an abstract way), therefore the conclusion that the Brussels I Regulation was indirectly violated by the fact that a court of a Member State was deprived of exercising its jurisdictional power under the Brussels I Regulation could not be drawn in such a case.

Limiting its considerations on the Italian proceedings, the ECJ could also avoid arguing with a substantive part of the reasoning of the House of Lords in explaining why the Brussels I Regulation was not applicable.[313]

The absence of such reasoning is regrettable, since the anti-suit injunction, in connection with arbitration in the EU, was a highly controversial topic for a long time meaning that only a comprehensive and detailed reasoning would have been adequate and would have a chance to quiet the minds. Such modest reasoning is also likely to raise reasonable suspicion that the decision was given more out of practical reasons than based on a sound legal argument.

---

[311] *National Westminster Bank Plc v Utrecht-America Finance Co* (2001) 3 All ER 733 (CA) 739.

[312] Brussels I Regulation op cit art 2.

[313] Santomauro P 'Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of the EC Regulation 44/2001' (2010) *6(2) Journal of Private International Law 281* at 287.

I would even go as far as to agree with some of the commentators who state that the admissibility of an anti-suit injunction in a Community context involving two Member State courts would require consideration of both proceedings as a global, systemic perspective.[314]

8.2. Principle of Effet Utile or Effective Judicial Protection

The Advocate General, as well as the ECJ, briefly stated that the grant of a restraining order in English proceedings would amount to an infringement of the principle of effet utile or effective judicial protection, on which the Brussels I Regulation was based.[315] Unfortunately, neither the Advocate General nor the ECJ went into further detail in this respect.

The principle of effet utile in European law is well established.[316] It means that the courts of the Member States have to make sure that national rules and legislation do not hinder the effectiveness of European law.[317] Thus, they have to comply with European law where it explicitly applies and avoid the application of any national rules impairing EU legislation.[318] The principle of effet utile is a consequence of the general predominance of EU law over national legislation.[319] The ECJ simply referred to the decision in *Turner v Grovit* and pointed out that the effectiveness of the Brussels I Regulation was impaired by the use of anti-suit injunctions, even if one holds that they are a procedural means of national law and even if the Brussels I Regulation did not directly apply to the English anti-suit injunction proceedings, since the implications imposed on the proceedings to be restrained interfere with the aims of the Brussels I Regulation.[320]

Other commentators were of the same opinion as the ECJ, stating that the fact that the English proceedings fell outside the scope of the Brussels I Regulation would not hinder the applicability of the principle of effet utile,

---

[314] Requejo M 'West Tankers: the Advocate General's opinion' (2008) *(E) 5/6 The European Legal Forum 250* at 252. Available at www.simons-law.com/library/pdf/e/891.pdf (accessed 12 March 2011).
[315] *Opinion Kokott* op cit para 58; *West Tankers decision* op cit para 24.
[316] Steinbruck B 'The Impact of EU Law on Anti-suit Injunctions in Aid of English Arbitration Proceedings' (2007) *26 (Jul) Civil Justice Quarterly 358* at 365.
[317] Ibid.
[318] Ibid.
[319] Illmer N Naumann I op cit at 156; Steinbruck B op cit at 365; Santomauro P op cit at 293.
[320] *West Tankers decision* op cit para 23 et seq.

since the Italian court would be impaired to exercise its jurisdiction according to the Brussels I Regulation.[321] One commentator went into further detail by stating that the House of Lords' argument that the indirect interference in foreign proceedings by the grant of an anti-suit injunction was divorced from reality was not a sufficient legally finding considering the decision in *Turner v Grovit*.[322] Furthermore, he added that even if addressed to the party, the anti-suit injunction has an effect on the court proceedings if the claimant is restrained from continuing and has to end the proceedings since the state court cannot continue the proceedings on its own accord.[323] Referring to *Gasser v MISAT* and *Turner v Grovit,* he stated that the interference, therefore, impeded the effectiveness of the Brussels I Regulation in achieving a free movement of decisions, which on the other hand was based on the principles of mutual trust and mutual recognition.[324] In his opinion, these principles could be affected even if there was no uniform set of rules for arbitration.[325] He argued that these principles were deduced from the aim of recognition and thus exceeded mere jurisdictional concerns. The consequence was that they always applied, as long as the decision to be recognised came within the scope of the Brussels I Regulation.[326] Finally he stated, among others[327], that the anti-suit injunction would also contradict the effectiveness of art 35(3) of the Brussels I Regulation since it would result in a review of the jurisdiction ex ante.[328]

As opposed to that, others did not approve the reasoning of the ECJ.[329] According to one commentator, the ECJ's approach did not acknowledge that the decision to conclude an agreement to arbitrate is a consensual one and happens voluntarily. So, in his opinion, the parties must abide to their contractual obligation in the event of a dispute and should not be allowed to institute legal proceedings before a state court in the hope to circumvent arbi-

---

[321] Santomauro P op cit at 293.
[322] Ibid.
[323] Ibid.
[324] Ibid.
[325] Ibid.
[326] Ibid.
[327] Illmer N Naumann I op cit at 156.
[328] Santomauro P op cit at 294.
[329] Fentimann R 'Arbitration and anti-suit injunctions in Europe' (2009) *68(2) Cambridge Law Journal 278* at 279; Seriki H 'Anti-suit Injunctions, Arbitration and the ECJ: An Approach to far?' (2010) *Issue 1 Journal of Business Law* at 30.

tral proceedings.[330] Another commentator pointed mainly to the fact that the injunction relief did not touch upon the Italian court's competence to test the arbitration agreement, as it was up to the respective claimant, i.e. in the present case Allianz, to discontinue the proceedings, and that this was a choice a claimant always had.[331]

These arguments show their emphasis on the fact that the English courts assess the conduct of the anti-suit injunction defendant in the foreign proceedings rather than the jurisdiction of the foreign court. But in my opinion this is not the point. The ECJ's argument has to be questioned insofar as it did not explain why the principle in the *Turner v Grovit* decision was applicable, although it concerned anti-suit injunctions in state court proceedings in two different Member States so that both proceedings fell under the Brussels I Regulation. The principle of effet utile does, in my opinion, only apply if European law is applicable. However, this was only true for the Italian proceedings and not for the English proceedings. Therefore, the principle of effet utile has to be assessed together with the scope of the arbitration exclusion under the Brussels I Regulation.

The reasoning of one commentator who agreed with the ECJ is also not fully convincing.[332] I do agree insofar that an indirect interference with the foreign court's jurisdiction, in the case of an anti-suit injunction in protection of an exclusive jurisdiction agreement, can definitely be answered in the affirmative, as already established in *Turner v Grovit*. Although these considerations again disregard that the main proceedings were allegedly outside the scope of the Brussels I Regulation based on the agreement of the parties to arbitrate a possible dispute. His argumentation is a circular reasoning, because the ECJ itself determined that there is mutual trust and recognition between the Member States under the Brussels I Regulation, since there is a uniform set of rules available under the latter. In light of his explanations that there were no uniform set of rules for arbitration and also no general "mutual trust" between the Member States outside of the Brussels I Regulation[333], his final conclusion that the aim of recognition makes the principles still applicable is rather surprising. The aim of a treaty is only

[330] Seriki H op cit (n 329) at 30.
[331] Fentimann R op cit at 279.
[332] Santomauro P op cit.
[333] Santomauro P op cit at 293.

relevant in case the treaty is applicable at all. Furthermore, I do not agree that the aim of the free movement of decisions is impaired, since it is at least controversial if a decision of a Member State, in disrespect of an arbitration agreement, can be recognised and enforced under the Brussels I Regulation.[334] With respect to art 35(3) of the Brussels I Regulation, it has to be said that this provision only prohibits an ex post examination of the jurisdiction of a Member State court - thus it says nothing about an ex ante examination.

As recognized rightly by a commentator 'Reintroducing the powers of national courts based on potential secondary effects risks seriously diluting the strength of arbitration as a private form of dispute resolution'.[335]

8.3. The Right of Access to Courts

Closely related to the principle of effet utile is the right of access to courts. The Advocate General and the ECJ briefly stated that the grant of a restraining order in the English proceedings would amount to an infringement of the right of access to courts, as provided for in the Brussels I Regulation.[336] Again, the ECJ does not deliver any thorough statement. As opposed to that, some commentators went into detail in this respect. It was held that the influence of the anti-suit injunction proceedings on the Italian proceedings touched upon the guarantee of judicial protection, which asks for the free access to the courts of the Member States enabled through the jurisdictional heads in the Brussels I Regulation. He held that this was an essential objective of the latter[337] and therefore referred to the relevant provisions of the EU Treaty and the Human Rights Convention, which both have to be considered while interpreting the Brussels I Regulation.[338] He weighed this argument against the argument that the parties, while entering an arbitration agreement freely and wilfully, decided not to apply these

---

[334] See further explanations below s IV/8/8.4.

[335] Dutson S Howart M 'After West Tankers – Rise of the "Foreign Torpedo"?' (2009) *75(3) Arbitration 334* at 338.

[336] *Opinion Kokott* op cit para 58; *West Tankers decision* op cit para 31.

[337] Santomauro P op cit at 288; The same argumentation was given prior to the ECJ's *West Tanker* decision by Steinbruck B 'The Impact of EU Law on Anti-suit Injunctions in Aid of English Arbitration Proceedings' (2007) *26 (Jul) Civil Justice Quarterly 358* at 367.

[338] Treaty on European Union 1992 O J 191 art 6(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5 art 13. Available at http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (last acessed 12 August 2011).

jurisdictional rules.[339] The question here was if and to what extent such right could be waived.[340] He argued that the jurisdiction of a certain judicial body, under the Brussels I Regulation, was generated in the very moment the prerequisites of the respective provision were given. Thus, a party only needed to activate that court's power to rule. He then followed that even if 'both the arbitral tribunal and the court are entrusted to decide on the existence of an agreement, surely the tribunal (or, for that matter, the courts supporting it) is not in any better position than the court whose default jurisdiction "has been taken away" – on the contrary'.[341]

Alleviative, he added that it was not always for the court with default jurisdiction to decide on the existence of an arbitration agreement, but at least in case a party instituted proceedings before it. He then concluded consistently with the ECJ, that otherwise court proceedings could be avoided by the simple allegation that there was an arbitration agreement. Thus, according to that, since the anti-suit injunction would hinder the party to act in court, that party would no longer be in a position to object to the arbitral tribunal's jurisdiction by bringing up state court proceedings before the competent Member State court, and would therefore loose the right to judicial protection. He also dismissed the argument that an ex post legal protection through a court, after an arbitral award was rendered, would be sufficient. Furthermore, in his opinion the dispute over the existence of an arbitration agreement actually showed a lack of consensus as to whether the parties wanted to remove the state courts from their legal relationship, so that a court second seized for the grant of an anti-suit injunction should not anticipate this decision.[342] He pointed out that while one party has the possibility to start arbitral proceedings according to the arbitration agreement, the other party must have the possibility to defend itself and to start court proceedings before the court that was competent in case the arbitration agreement was not valid. According to him, the breach of an arbitral agreement could, on a substantive level, possibly lead to compensation, but not to the loss of the right to legal protection before a national court.[343]

---

[339] Santomauro P op cit at 289.
[340] Ibid.
[341] Ibid.
[342] Santomauro P op cit at 290.
[343] Ibid.

Finally, he stated that the single focus on the Italian proceedings, as well as the statement that both proceedings do not need to be covered by the scope of the Brussels I Regulation, was justified since legal protection must outweighed private autonomy, just as an objection of lack of jurisdiction before a national court based on an arbitral agreement by the respondent and anti-suit injunction seeker must prevail over the application of an anti-suit injunction of the latter.[344]

Though I find this reasoning to be, in some parts, plausible, I cannot approve of it in every respect. He explains the different views of the House of Lords and the ECJ by referring to the fundamental difference of the Anglo-American and the Continental-European legal tradition to deal with jurisdictional issues, stating that the Anglo-American tradition sees the matter from a private law perspective, whereas the Continental-European approach sees it in terms of public law. Consequently, from the public law aspect, the right to go to court dominates whereas from the private law aspect the contractual 'right not to be sued abroad' clause from the arbitral agreement is relevant. He then rightly identifies the relevant question as to whether and to what extent a party can waive the right of judicial protection, but then fails to adequately give reasons for his conclusion as to why judicial protection shall precede party autonomy. In my opinion, it is not obvious why parties in international commercial arbitration, generally familiar with business contracts and able to independently decide upon their business matters, must be protected.

Although he is, in general, right that jurisdiction already originated in the very moment the respective facts and prerequisites under the Brussels I Regulation are given and jurisdiction only needs to be invoked, this is only true if there is no arbitral agreement. Due to the arbitral agreement the parties clearly excluded the allocation of jurisdiction according to the Brussels I Regulation. Furthermore, his conclusion that the arbitral tribunal or the supporting courts are in no better position to decide over the arbitral agreement than the court whose jurisdiction "has been taken" away, defalcates exactly that this was the will of the parties involved while concluding an arbitration agreement. The European Court of Human Rights ruled in this respect that a party, if not under duress, might waive this right by a freely chosen exclu-

[344] Santomauro P op cit at 291.

sive arbitration agreement.[345] So the right for judicial protection is not endangered, but has simply shifted to another authority, i.e. the arbitral tribunal, due to the free will of the parties. Furthermore, an arbitral award is generally subject to a national court's review in the appellate proceedings and later in the recognition and enforcement procedures.[346] The argument that an ex post legal protection would, in many cases, not be sufficient is not convincing in my opinion, since the party which initially concluded an arbitration agreement should face a disadvantage rather than the party adhering to that agreement. The only reason he adduced why the access to court should prevail the autonomy of the parties is that in case of a disputed arbitration agreement, there is apparently no consensus between the parties as to whether both parties wanted to exclude the state courts or not. So for him the party autonomy is actually respected. The Advocate General[347] used this argument to counter the House of Lords' argumentation, with respect to the practical reality of arbitral proceedings.[348] However, this argument pays no attention to the problem that a party may well start court proceedings in disrespect of an arbitration agreement as a tactical manoeuvre, in order to simply delay or avoid arbitral proceedings. Other commentators have also pointed this out.[349] Tactical litigation is often used in commercial arbitration, as the amount in dispute is often very high so the parties would tend to use all means possible. In any case, the various decisions of English courts and the ECJ show that parties often disagree as to whether the arbitration agreement is valid and applicable when a dispute arises.[350]

Moreover, the opinion of the House of Lords that only the arbitral tribunal and the courts at the seat of the arbitration are in a position to decide on the existence of the arbitral agreement does not deprive a party from contesting the existence of the arbitration agreement in these proceedings. Thus it cannot be said that this party is defenceless. It is indeed – as stated by other commentators - not obvious as to why a party instituting legal proceedings in apparent breach of an arbitration agreement should be offered

---

[345] *Deweer v Belgium* (1980) 2 EHRR 439 para 49.
[346] See for example Uncitral Model Law op cit Chapter 7 and 8.
[347] *Opinion Kokott* op cit para 67.
[348] See below s IV/6.
[349] Seriki H op cit (n 329) at 29.
[350] Ibid.

more protection than a party which simply wants to abide by the agreed terms and therefore enforce the arbitration agreement.[351]

Therefore, the argument of a violation of the right for judicial protection is not entirely convincing, but it is regrettable that the ECJ did not assess this problem in more detail.

8.4. Scope of Article 1(2)(d) of the Brussels I Regulation

The ECJ only referred to its previous jurisdiction and the Advocate General's opinion, stating that the subject-matter of the dispute itself is decisive in order to determine whether the Brussels I Regulation was applicable. Concluding that the objection of a lack of jurisdiction, based on the contested validity and application of an arbitration agreement, is only an incidental question in the dispute concerning a tort-based claim; the Italian proceedings were not covered by the arbitration exclusion. As opposed to the General Advocate, the ECJ did not deal in detail with the scope of the arbitration exclusion and its application to incidental questions, but implicitly dismissed the House of Lords' broad approach of the interpretation by concentrating on the substantive subject-matter of the dispute.[352]

Various commentators dealt with the interpretation of the scope either in the forefront of or after the *West Tankers* decision. A lot of them strongly rejected the narrow interpretation of the ECJ on good grounds[353]; others followed the ECJ[354] or came to the conclusion that this question could be left open.[355] Since the ECJ, once again, did not go into much detail, the most important reasons stated by these authors, as well as my own conclusion, will be given below.

One commentator contradicted the three basic arguments of the Advocate General in respect of the scope of application. She considered the *Gasser v MISAT* decision on which the Advocate General relied on as not applicable, since it dealt with an exclusive jurisdiction clause and not an arbitra-

---

[351] Dutson S Howart M op cit at 339.
[352] *West Tankers decision* op cit para 26.
[353] Requejo M op cit at 252; Seriki H 'Litigating in Breach of Arbitration: What exactly does Article 1(4) of the Brussels Convention cover? (2000) *66(1) Arbitration 49* at 52; Fentimann R op cit at 279; Dutson S Howarth M op cit at 339;
[354] Santomauro P op cit at 291; Dutta A Heinze C A op cit at 416 et seq.
[355] Steinbruck B op cit at 363.

tion agreement. Turning to the *Atlantic Emperor* she stated that the Advocate General's argument was sensu contrario.[356] In her opinion, the ECJ's decision only determined that any preliminary issue to be decided for the determination of the dispute would not lead to the application of the Brussels Convention in case the main subject-matter of the dispute was not covered by its scope.[357] She then questioned the assertion made by the Evrigenis/Kerameus Report according to which 'the preliminary issue concerning an arbitration clause follows the system applicable to the principal issue when the Brussels Convention/Regulation apply to the latter'.[358] According to her, it is controversial if a judgment of a Member State court must be recognised when given in disregard of an arbitration agreement. Therefore, the argument that legal security is jeopardized if the preliminary issue, which could be raised in a dispute at any time, would influence the applicability of the Brussels I Regulation on the main proceedings was not convincing. Due to the insecurity with regard to the recognition and enforcement of a decision in disrespect of an arbitral agreement this problem was therefore for her only postponed to the recognition and enforcement procedure.[359] On the other hand, if one assumed that such judgment had to be recognised in the Member States, it would in fact mean that Community trust would go beyond the Brussels I Regulation, covering the subject of arbitration as well. Therefore, in her opinion, there is no security in respect of the treatment of preliminary issues.[360] Furthermore, she rightly stated that there are different kinds of preliminary issues that might have an influence on deciding whether the Community system is applicable.[361] In her opinion, 'an issue concerning an excluded subject-matter (the resolution of which will affect the bias of the resolution on the merits) is not the same as a preliminary issue concerning whether the subject- matter is excluded by Art 1.2 of the Regulation' since 'in the latter case there is a query prior to determining the applicability of the Community scheme'.[362]

---

[356] Requejo op cit at 339.
[357] Ibid.
[358] Evrigenis D I Kerameus K D op cit para 35.
[359] Requejo op cit at 339.
[360] Ibid.
[361] Ibid.
[362] Ibid.

In my opinion, she rendered the reasoning of the Advocate General and the ECJ invalid based on the ECJ's previous jurisdiction, since the cases referred to where either not concerned with arbitration[363] or else the decision could not or would not only be interpreted that way[364]. Indeed, the reasoning in the *Atlantic Emperor* does not necessarily allow the conclusion as drawn in *West Tankers* that whenever the subject-matter of a dispute comes within the scope of the Brussels I Regulation, any preliminary issue raised with regard to that dispute which itself is not covered by the latter does not have any influence of its applicability. She also rightly recognised that a decision of the Italian court disrespecting the arbitration agreement might lead to a refusal of recognition and enforcement hence only postponing the problem to a later stage. However, the most important of her arguments is indeed if one could treat all preliminary issues the same way. A preliminary issue concerning the court's competence ratione materiae and a preliminary issue concerning the question of the right legal venue when the jurisdiction of that court is contested, based on an exclusive jurisdiction clause, must be treated differently. In the first case, the applicability of the Brussels I Regulation is questioned in whole, as the Brussels I Regulation does not cover arbitration. Whereas in the latter case, the Brussels I Regulation is applicable to both proceedings and only the relevant provisions to be applied are controversial.

One of the commentators brought up another argument. In his opinion, if one assumed that the dispute was covered, one would actually assume that the courts at the domicile of the counterparty were competent to determine the dispute, which would destroy the aim of arbitration which is to provide a possibility to resolve disputes in a neutral environment.[365] According to him, the statement in the *Atlantic Emperor* that arbitration was excluded in its entirety, including court proceedings brought before national courts, was in favour of the argument that a dispute about the validity of an arbitration agreement was not covered by the scope of the Brussels Convention.[366] He even questioned if the categorization of the issue of the validity of an arbitration agreement, as an incidental issue to arbitration, was

[363] *Gasser v MISAT* op cit.
[364] *The Atlantic Emperor* op cit.
[365] Seriki H op cit (n 353) at 52.
[366] Ibid.

correct, as once this issue was on the table it turned into a central question, no matter if it was raised in a procedural or a substantive context.[367] I agree with this argument, since the allocation of jurisdiction under the Brussels I Regulation does not attend to the individual particulars of international arbitration, precisely because other international treaties already covered the arbitration matter.

Another commentator mainly agreed with the Advocate General that a preliminary issue could be raised at any time, and that it would be against legal certainty if the nature of such issue would change the classification of the proceedings every time. However, in my opinion, this argument does not differentiate between different preliminary issues, nor does it take into account why arbitration was excluded. The arbitration exclusion was implemented in order to prevent any interference with other treaties, in particular the New York Convention. If such proceedings were not excluded, it might result in two conflicting judgments, one given in the arbitral proceedings, one in the state court proceedings. Both could be recognisable under the New York Convention and under the Brussels I Regulation respectively.[368] Consequently, the New York Convention would in fact be impaired. Thus, the arbitration exclusion must have a broad interpretation in order to avoid such interference. Article 71(1) of the Brussels Convention states that it shall not affect any [other] Conventions to which the Member States are parties and therefore also supports this conclusion.[369]

Another convincing aspect in my eyes, is that arbitration does not have the same support in all Member States and that the treatment of the efficacy of an arbitration agreement, as an incidental question, does not seem to take arbitration seriously. Moreover, a party intending to avoid arbitral proceedings might choose to start legal proceedings before a court of a Member State which is known to be averse to arbitration, and thus would not uphold the arbitration agreement.[370]

---

[367] Ibid.

[368] At least if the state court judgment is given before the arbitral award and one tends to follow a widespread opinion that judgments in disrespect of an arbitration agreement have to recognised and enforced under the Brussels I Regulation.

[369] Lehmann M 'Anti-suit injunctions zum Schutz internationaler Schiedsvereinbarungen und der EuGVOO' (2009) *62(23) Neue Juristische Wochenschrift Volume 1645* at 1647.

[370] Kuipers JJ 'Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice' (2009) *10 German Law Journal 1505* at 1516.

Authoritative European scholars generally approve the application of the Brussels I Regulation on proceedings concerning the grant for an anti-suit injunction when the main dispute is allegedly subject to an arbitration agreement.[371] Consequently, they consider anti-suit injunctions as incompatible with the Brussels I Regulation. At the same time however, they consider the main proceedings for declaratory relief on the subject of the efficacy of an arbitration agreement as being excluded from the scope of the Brussels I Regulation.[372] The antagonism of that approach is, in my view, that the Brussels I Regulation does not cover proceedings concerning the validity and application of an agreement to arbitrate, whereas a preliminary issue in relation to the very same matter is considered as covered, as others have also recognised.[373]

The ECJ gives no explanation of reasoning either and once again it is therefore not convincing in this respect.

8.5. Principle of Separability

The principle of separability in arbitration means that the arbitration agreement in a contract is considered to be separate from the main contract of which it is a part, and thus survives even if the main contract is terminated.[374] The concept of separability is today generally recognised in all developed arbitration jurisdictions.[375]

In connection with the interpretation of the scope of the arbitration exclusion by the ECJ, it has been argued that this approach disrespects the concept of separability[376], since in case of the existence of an arbitration clause, any injunction granted would be related to the arbitration agreement and not to the substantive dispute between the parties.[377] In my opinion, this maybe true, but considering the arbitration agreement as a separate contract would also speak for an autonomous tie of the question of validity and ap-

---

[371] Geimer R Schütze RA *Europäisches Zivilprozessrecht* 3ed (2010) 107; Kropholler J *Europäisches Zivilverfahrensrecht* 8ed (2005) 88.
[372] Geimer R Schütze RA op cit 106.
[373] Dutson S Howarth M op cit 339.
[374] Blackaby N et al op cit para 2.89.
[375] Blackaby N et al op cit para 2.98.
[376] Seriki H op cit (n 329) at 28.
[377] Ibid.

plicability of such agreement, instead of treating it as a mere preliminary issue.

On the other hand, it was pointed out that the attention on the Italian proceedings as the relevant ones interfered with the principle of separability.[378] According to them, the English proceedings were concerned with the attempt to give effect to the arbitration agreement, which was a separate claim from that regarding the duties and rights underlying the main contract between the parties.[379] Indeed, it was rightly recognized that the principle of separability would have delivered an approach to reach the conclusion that the preliminary question of the existence of an arbitration agreement was not covered by the Brussels I Regulation.

8.6. Principle of Kompetenz-Kompetenz

The ECJ further stated, by pointing to *Gasser v MISAT,* that an anti-suit injunction would also disrespect the general principle according to which every court seized is entitled to determine its own jurisdiction according to the applicable law.[380] The considerations of the ECJ referred to art 27 and 28 of the Brussels I Regulation, granting exclusive jurisdiction to the court first seized. However this argument of the ECJ can very well be reversed. The Kompetenz-Kompetenz doctrine is also a principle widely accepted in international arbitration.[381] Every arbitral tribunal has the power to investigate its own jurisdiction, which is of course then subject to a review by the competent national courts.[382] In contrast to the decision in *Gasser V MISAT,* where the anti-suit injunction was granted in protection of an exclusive jurisdiction clause, in the presented case it concerns an arbitration clause. Thus it can be held that the arbitral tribunal should first assess a questioned arbitration agreement. Rightly, this has been recognized by other commentators.[383]

---

[378] O'Gallaghan K Singh S 'Arbitration and the Brussels Regulation: Where now?' (2009) *3(1) Dispute Resolution International 31* at 36.
[379] Ibid.
[380] *West Tankers* decision op cit para 29.
[381] Blackaby N et al op cit para 5.98.
[382] Ibid.
[383] Fentimann R op cit at 280; Seriki H op cit (n 329) at 29.

8.7. Principle of Mutual Trust

The ECJ referred again to the principle of mutual trust on which the *Turner v Grovit* decision was based, and stated that even proceedings which fell outside the scope of arbitration could infringe the principle of mutual trust.

The statement of the ECJ raised many critics[384], but also had its supporters.[385] The critics mainly argued that the principle of mutual trust was not touched upon, since the Brussels I Regulation's rules concerning parallel proceedings were not applicable in case the anti-suit injunction proceedings were intended to give effect to an arbitration agreement.[386] Other critics pointed out that the principle of mutual trust did not, in general, account for the different civil procedure systems present in the Member States, and that it was therefore questionable as to why an English court should trust that the parties were referred to arbitration by another Member State court.[387] Moreover, the absolute priority given to the court first seized was criticized, and a more discriminatory application of the principle was demanded in order to recognise the significance of and to give priority to the arbitration agreement.[388]

The critics of course, quite rightly, persisted in their viewpoint that this principle was only relevant in case the Brussels I Regulation was applicable at all. Thus, using a broad interpretation of the scope of the Brussels I Regulation or else considering the English proceedings as relevant too (which were not within the scope of the Brussels I Regulation) consequently leads to the non-application of the Brussels I Regulation. As a result, the court is not bound by the rules of the Brussels I Regulation and consequently not by a principle underlying these rules - in particular when based on reciprocity. If such principles had applied nonetheless, there was no need to exclude any fields of law from the Brussels I Regulation. The Member States did not commit themselves to mutual trust in the field of arbitration which, in my eyes, includes the decision over the efficacy of an arbitration agreement.

---

[384] Schlosser P op cit at 489; Dutson S Howarth M op cit at 340; Fentimann R op cit at 280.
[385] Santomauro P op cit at 293; Illmer M Naumann I op cit at 155 et seq.
[386] Schlosser P op cit at 489; Fentimann R op cit at 280.
[387] Dutson S Howarth M op cit at 340.
[388] Ibid.

Furthermore, it seems that the ECJ uses the principle of mutual trust in order to overcome the sometimes very different procedural and substantive laws of the Member States which remain applicable, besides the Brussels I Regulation.

8.8. New York Convention

The Advocate General, as well as the ECJ, sees their argumentation that the anti-suit injunction interfered with the right of the court first seized to examine its jurisdiction as confirmed by art 2(3) of the New York Convention. Article 2(3) provides that a court refers the parties to arbitration in case it considers the efficacy of the arbitration agreement as given.[389] Thus, the right to examine the arbitration agreement seems not to be reserved for the arbitral tribunal or the courts at the seat of arbitration only, which has been noted by other comments too.[390]

The ECJ's approach has also been criticized.[391] It was argued that the interpretation of art 2(3) of the New York Convention has to take into account the principle of Kompetence-Kompetence, meaning that the arbitral tribunal should determine its jurisdiction in the first instance. Accordingly, in their opinion the matter should be referred to arbitration except in rare cases when an arbitral agreement was null and void, inoperative or incapable of being performed. Thus, for them, the Kompetenz-Kompetenz principle made specific sense against the background of this interpretation.

Others brought up the same argument. According to them, under art 2(3) the foreign court was not in a position to hear substantive arguments concerning the jurisdiction of the arbitral tribunal until the latter had itself the opportunity to do so. So the Italian court only had to assess whether an arbitration agreement existed. They considered this recognition of priority and systematic referral to the arbitral tribunal as consistent with the obligations under the New York Convention, which, according to art 71(1), prevail the Brussels I Regulation. As a result, they were of the opinion that the English

---

[389] Opinion Kokott op cit para 55; *West Tankers* decision op cit .
[390] Santomauro P op cit at 292.
[391] Dutson S Howarth M op cit at 339 et seq.; Knowles J 'West Tankers: What It Says, What It Matters and What It Means for those Arbitrating in Europe' (2009) *14(2) IBA Arbitration News 61* at 62 et seq.

anti-suit injunction could only interfere with the functioning of the New York Convention and not the Brussels I Regulation.

The ECJ is correct in that, according to the New York Convention, the court should not refer the parties to arbitration without examination of the arbitration agreement - but it is indeed questionable how far the foreign court shall conduct this examination. In light of the Kompetenz-Kompetenz principle, the proposed reluctance in this respect is justified. The parties had agreed to arbitrate and therefore to exclude national courts, thus they believed that the arbitral tribunal or the courts at the seat of arbitration would examine the arbitral agreement.

In my opinion, the conclusion that art 2(3) of the New York Convention supports the ECJ's argument disregards that the mere fact that the New York Convention only provides for the examination of the arbitration agreement by a court in general. It certainly does not say anything about the admissibility of anti-suit injunctions. Since there were two court proceedings and potentially one arbitral proceedings involved in the present case, the New York Convention was only useful if it contained substantive procedural rules, in particular with regard to lis pendens and parallel proceedings. Therefore, I do not see that the New York Convention supports the interpretation given by the ECJ.

8.9. Practical Reality of Arbitration

The ECJ did not even address the argument of the House of Lords that the practical reality of arbitration required the English courts to grant anti-suit injunctions. The Advocate General dismissed it, stating that economic reasons could never justify a breach of Community law, but considered that in the present case the interpretation of the Brussels I Regulation did respect individual autonomy and the operation of arbitration.

The argument of the House of Lords was a desperate last attempt to preserve the anti-suit injunction as an old English procedural tool developed over centuries, rather than a real argument. The EU, as a Community, operates according to the rule-of-law principle, so it has to abide by the law independently from the economic outcome or else it would have to change the respective law. So I agree with the Advocate General that if it were not

for other arguments, she could not follow the House of Lords purely because of economic reasons.

9. CONSEQUENCE OF WEST TANKERS

9.1. Elimination of Anti-suit Injunctions in the EU

The *West Tankers* decision, first and foremost, without doubt barred the use of anti-suit injunctions and left no room for this common law remedy within the EU. Another practical consequence resulting from that decision is that a party must always object to a national court's jurisdiction in order to achieve a referral to arbitration, since the possibility to restrain the claimant in that courts' proceeding is no longer given.

9.2. Increase of Forum Shopping and Parallel Proceedings

The *West Tankers* decision gives cause for concern in that the use of tactical litigation and parallel proceedings will increase in connection with arbitration under the Brussels I Regulation.[392] Indeed, the *West Tankers* case unfolded even more its potential to use abusive tactical litigation.[393]

A party could even go so far as to choose a court of a Member State, provided that such court would be competent under the Brussels I Regulation, which is known to be opposed to arbitration and thus more likely to consider an arbitration agreement as not valid or applicable. For the other party, this would at least mean a delay and further costs, or in the worst case, the loss of a resolution of the dispute by arbitration.

9.3. Increase of Conflicting Decisions

It was revealed that a party not willing to adhere to an arbitration agreement could institute legal proceedings in a more favoured jurisdiction. If the counterparty would contest the jurisdiction of such a court due to the arbitration agreement, the validity of the arbitration agreement would be assessed as a preliminary question as to which extent the Brussels I Regulation covers the subject of arbitration, due to the *West Tankers* decision.[394] If

[392] Dutson S Howarth M op cit at 337.
[393] Impact Assessment op cit 35.
[394] Ibid.

a court would declare its jurisdiction while arbitral proceedings are taking place, then the probability that two conflicting judgments would result is very high. However even if this is not the case, it still gives a party an effective tool to delay or even avoid arbitral proceedings.[395]

9.4. Conflict of Recognition and Enforcement Procedures

As has been remarked above[396], if the arbitral tribunal, as well as the state court seized, would declare to have jurisdiction over the case, two potentially conflicting decisions could be given. As a result, there would be an arbitral award which could be recognised and enforced under the New York Convention, and a judgment of a court of a Member State which could be recognised and enforced under the Brussels I Regulation[397]. This would create a conflict between the Brussels I Regulation and the New York Convention. This is exactly the situation that should have been avoided by the exclusion of arbitration from the scope of the Brussels I Regulation.[398]

However, the resolution of this conflict in favour of the New York Convention according to art 71(1) of the Brussels I Regulation would render the *West Tankers* decision meaningless, since it protects the Italian proceedings, but not the judgment given in these proceedings.[399]

I also agree with a further conclusion, which argues that it is highly questionable if recognition and enforcement of a judgment given in disrespect of an arbitration agreement could still be refused on the grounds of the order public reservation, according to art 34(1) of the Brussels I Regulation.[400] The inadmissibility of anti-suit injunctions was based on the Brussels I Regulation's interdiction to assess the jurisdiction of the court of another Member State, thus a judgment given by a court of a Member State answering its jurisdiction in the affirmative can no longer be challenged.[401]

---

[395] Impact Assessment op cit 37.
[396] See above s IV/5/5.4.
[397] In case one follows the position of some jurisdictions that a judgment even if it disrespects an arbitration agreement is recognisable and enforceable under the Brussels I Regulation.
[398] See also Lehmann M op cit at 1647.
[399] See also Lehmann M op cit at 1647.
[400] Balthasar S Richers R op cit at 355 et seq.
[401] Ibid.

9.5. Influence of London as Place of Arbitration

Many comments were of the opinion that London would not suffer a decrease in arbitration proceedings in case of a general inadmissibility of anti-suit injunctions. The main reason for this was that other European arbitration venues, such as Zurich, Paris or Stockholm do not have such a remedy at hand, but are nevertheless popular [402] and that London has to offer other advantages as a place of arbitration[403], such as the availability of skilled professionals or accommodation, security, accessibility and public transport.

It is true that other arbitration centres in Europe are popular even without such remedy. However these places still have all the advantages they had before *West Tankers*, whereas London has now lost at least one of them. Thus, when parties now evaluate between London and another European city as a place of arbitration, and favours both places, there is no specialty such as the anti-suit injunction advocating for London. In the end, I do agree that the influence could only be minor, since all the other factors influencing this choice are, in my opinion, more important.

9.6. Importance of the Draft of the Arbitration Agreement

Last but not least, in light of this decision, the importance of the draft of a clear and valid arbitration agreement cannot be overstated, as has rightly been recognised. [404]

10. IMPACT ON FURTHER ARBITRAL PROCEEDINGS IN SWITZERLAND

10.1. Circumstances of the Case

In connection with Switzerland, the question remains if the English courts had to abide by the preliminary ruling in *West Tankers* when applying the Lugano Convention in a comparable situation. Such a situation could arise

---

[402] Nelson TG McInerney CP 'A Farewell to Arms? West Tankers and the Demise of the Anti-suit Injunction in Europe' (2009) *2(2) New York Dispute Resolution Lawyer Volume 45* at 46; Dutson S Howarth M op cit at 337; Clifford P Browne O 'Lost at sea or a storm in a tea-cup? Anti-suit injunctions after West Tankers' (2009) *12(2) International Arbitration Law Revue 19* at 21.

[403] Seriki H op cit (n 329) at 34.

[404] Tumbridge J 'European Anti-suit injunctions in favour of Arbitration – A Sea Change?' (2010) *21(5) International Company and Commercial Law Review 177* at 184.

if two parties conclude an arbitration agreement, determining the seat of arbitration in London, and one of these parties starts courts proceedings in Switzerland in disrespect of said agreement, provided that the Lugano Convention and not the Brussels I Regulation was applicable. The question here is if the other party could then start proceedings before English courts, submitting an application for the grant of an anti-suit injunction in order to prevent the counterparty from continuing the Swiss proceedings.

10.2. Application of the Lugano Convention

As opposed to Switzerland, which is only bound by the Lugano Convention, the EU Member States are bound by the Brussels I Regulation and the Lugano Convention. Article 64 of the Lugano Convention therefore determines the relationship between the latter and the Brussels I Regulation.

The basic principle is that the courts of the Member States of the EU have to apply the Brussels I Regulation with regard to persons domiciled in the Member States. There are a few exceptions from this general principle, but only one of them is relevant for the case at hand. All courts, whether subject to the Brussels I Regulation and the Lugano Convention or only the latter, have to apply the Lugano Convention if the defendant is domiciled in the territory of a State that is only bound by the Lugano Convention.[405]

If a party would commence anti-suit injunction proceedings before an English court, the English court only had to apply the Lugano Convention if the defendant was domiciled in Switzerland. If this was not the case, the English courts have to apply the Brussels I Regulation, under which they could not issue an anti-suit injunction due to the *West Tankers* decision. However, the Lugano Convention might be applicable under these circumstances, meaning that the implications of the *West Tankers* decision have to be analysed.

---

[405] Pocar F 'Explanatory Report Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007' (2009) OJ C 319/01 para 197. Available at http://eur-lex.europa.eu/Notice.do?val=506024:cs&lang=en&list=506024:cs,506115:cs,506143:cs,506105:cs,506106:cs,506113:cs,506122:cs,506145:cs,506108:cs,506124:cs,&pos=1&page=1&nbl=61&pgs=10&hwords= (last accessed 28 February 2011).

10.3. Relevant Provisions of the Lugano Convention

According to art 1 of the Protocol 2 to the Lugano Convention, any court has the obligation to apply and interpret the Convention paying due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention, and the instruments referred to in art 64(1) of the Convention rendered by the courts of the States bound by this Convention, and by the ECJ.[406] One of the instruments referred to in art 64(1) is the Brussels I Regulation.

Since the provisions of the Brussels I Regulation and the Lugano Convention conform to one another except for minor deviations, the EU and EFTA Member States wanted to avoid conflicting interpretations in order to achieve the same level of flow of judgments between them. Therefore, the interpretation of the provisions of the Lugano Convention and the ones of the Brussels I Regulation should be as uniform as possible so that they are fully parallel.[407] When the two texts differ, the courts of the signatory States of the Lugano Convention have only to take account of judgments applying the Lugano Convention that are delivered by national courts.[408]

According to art 2 of the Protocol 2, the courts of the Member States of the EU may refer provisions of the Lugano Convention to the ECJ for preliminary rulings on their interpretation, since the Lugano Convention is part of Community law. Furthermore, if a preliminary ruling was achieved on the interpretation of the Brussels I Regulation, and these provisions were identical to those of the Lugano Convention, the interpretation given by the ECJ will be binding for the courts of the Member States of the EU and they would have to apply it in deciding the dispute.[409]

10.4. Conclusion

In the *West Tankers* decision the ECJ had to apply art 1(1) and 1(2) regarding the scope of application of the Brussels I Regulation and art 5 regarding the allocation of jurisdiction for delictual claims.[410] These provisions are ex-

---

[406] Lugano Convention op cit protocol no 2 art 1(1).
[407] Pocar F op cit para 197.
[408] Ibid.
[409] Ibid.
[410] *West Tankers* decision op cit para 5 et seq.

actly the same as in the Lugano Convention. Thus, the English courts have to follow the preliminary ruling of the ECJ given in *West Tankers* when applying the Lugano Convention.

Consequently, if a party would apply for an anti-suit injunction before English courts, in the case where there was a state court proceeding in Switzerland in alleged disrespect of an arbitration agreement, the English courts could not issue an anti-suit injunction since they are bound by the ruling of the *West Tankers* decision.

11. IMPACT ON FURTHER ARBITRAL PROCEEDINGS OUTSIDE EUROPE

11.1. Circumstances of the Case

The *West Tankers* decision clearly abolished the use of anti-suit injunctions within the EU and the EFTA Member States. So this leaves the question as to whether English courts could issue anti-suit injunctions in order to support an arbitration agreement, if the proceedings to be restrained were not instituted in these States and the seat of arbitration were in London. The ECJ did not yet rule on this question.

11.2. Applicability of the Principles referred to in *West Tankers*

English courts continued issuing restraining orders in relation to non-EU parties after the *West Tankers* decision, so it is clear that they assume they are still entitled to do so.[411] This seems rather obvious since the ECJ decided against restraining, orders based on the applicability of the Brussels I Regulation and the principles it is based on. The Brussels I Regulation is generally only applicable if the defendant is domiciled in a Member State.[412] Consequently, if the defendant is a non-EU party domiciled outside the EU, then the Brussels I Regulation is not applicable and underlying principles cannot be violated. Nevertheless, the ECJ's consideration that its reasoning was also supported by art 2(3) of the New York Convention raised doubts as to whether this meant that the *West Tankers* decision also applied in relation to signatory states of the New York Convention. However, in my opin-

---

[411] *Roger Shashoua, Rodemadan Holdings Limited, Stancroft Trust Limited v Mukesh Sharma* (2009) EWHC 957; Skype Technologies v Joltid Ltd & others (2009) EWHC 2783.
[412] Brussels I Regulation op cit art 4(1).

ion, in cannot be concluded from the reasoning of the ECJ that the same principles of the Brussels I Regulation apply to the New York Convention. Thus, there are no such "Convention rights" in relation to the New York Convention, as has been rightly recognized by the English Courts.[413]

11.3. Conclusion

In consideration of the explanations above, it can be said that the *West Tankers* decision had no impact on arbitral proceedings outside Europe. Nevertheless, a definite answer can only be given if the ECJ would rule on such question.

V. Final Conclusion

The answer to the preliminary question in *West Tankers* was not easy to give, since criticism had to be expected, whatever the decision turned out to be.

The ECJ considered the ratione materiae of the Italian proceedings within the scope of the Brussels I Regulation, since it was not a proceeding directly concerned with arbitration, i.e. a parallel and not an ancillary proceeding to a possible arbitral proceeding. Therefore, the English anti-suit injunction would indirectly hinder the Italian court to decide its jurisdiction according to the Brussels I Regulation, and would thus impede the effectiveness of the latter. The result of this approach is inconsistent, as the Italian proceedings come within the scope of the Brussels I Regulation, but the latter would no longer be applicable to constitute the jurisdiction of the Italian court, in case this court would consider the arbitral agreement as valid and binding. In which case, the Italian proceedings would fall under the arbitration exception according to art 1(2)(d) of the Brussels I Regulation, and the court would have to revert the parties to arbitration under the New York Convention.[414] Such a result, which has rightly been described as paradox[415], would require a more profound examination and reasoning than the

---

[413] *Roger Shashoua, Rodemadan Holdings Limited, Stancroft Trust Limited v Mukesh Sharma* op cit para 36 et seqs.
[414] Dutta A Heinze C op cit 418.
[415] Ibid.

one given by the ECJ. In particular, the ECJ should have explained why it did not matter that the English proceedings fell outside the scope of the Brussels I Regulation.

The same conclusion has to be drawn when the ECJ refers to a violation of the effet utile principle and the right of access to courts, based on its previous case law[416] to reason the incompatibility of an anti-suit injunction with the Brussels I Regulation in the present case. The *West Tankers* decision fails to address why the jurisdiction in *Turner v Grovit* was applicable to the present case, even though the parties did not have an arbitral agreement and only court proceedings were involved.

With regard to the explanations regarding the scope of application of the Brussels I Regulation, the *West Tankers* decision also lacks a sound argumentation as to why the Brussels I Regulation covers proceedings in which the validity and application of an agreement to arbitrate is raised as a preliminary question, whereas main proceedings for declaratory relief on the same subject are considered as not covered. Furthermore, it fails to present the reasons why the scope of applicability has to be interpreted in such a narrow way. The principle of severability, on the other hand, does argue for an autonomous consideration of the arbitration agreement instead of examining it as a mere preliminary issue.

The Kompetenz-Kompetenz principle is also not conducive to the reasoning of the ECJ. The considerations refer to art 27 and 28 of the Brussels I Regulation dealing with the allocation of jurisdiction in a case where two courts of different Member States are involved. Since the parties in *West Tankers* concluded an arbitral agreement to refer their disputes to arbitration, art 27 and 28 are not applicable, therefore even these considerations do not lead to the intended conclusion.

The principle of mutual trust is generally recognized. However, the ECJ failed to explain why this principle is applicable, although the Brussels I Regulation was not applicable on the English proceedings. The New York Convention is also not an argument against the compatibility of anti-suit in-

[416] *Turner v Grovit* (n 193).

junctions with the Brussels I Regulation, since it does not contain substantive procedural rules.

So, in my opinion, the reasoning of the decision was much more disappointing than the outcome. As has been explained above, a lot of relevant questions were not dealt with or else only in a marginal way. The matter in question had already been subject to several other decisions by the ECJ, which shows that the question was highly controversial. This alone should have been reason enough to delve into it for answers. However the ECJ missed the opportunity to do so, and preferred instead to go the easy route ignoring certain questions.

The ECJ applied the Brussels I Regulation in a very strict manner, and somehow extended its application by stating that the implications imposed on the other state court proceedings, even if indirect, are sufficient to violate the principles the Brussels I Regulation is based on. In my eyes, this approach is questionable since its extent cannot be well-defined and hence might lead to uncertainty amongst practitioners.

As has been explained above, the *West Tankers* decision might also have negative consequences. The banning of anti-suit injunctions in connection with the Brussels I Regulation and the Lugano Convention may lead to an increase of forum shopping and parallel proceedings and to an increase of conflicting decisions, which the Brussels I Regulation actually aims to avoid. Conflicting decisions will, as a consequence, also lead to recognition and enforcement problems. At the least, the consequences for London as a place of arbitration are, in my opinion, only minor.

Furthermore, the use of anti-suit injunctions is at least, as yet, not banned if one of the parties involved is located outside of the EU. Thus, there is still a field of application left for the anti-suit injunction.

As has been rightly recognized by the Advocate General, the solution to all these problems lies in the revision of the relevant provisions of the Brussels I Regulation. A specific rule on the relation between arbitration and court proceedings, according to which a court whose jurisdiction is contested due to an alleged arbitration agreement shall stay the proceedings if an arbitral tribunal has been seized in the case, or court proceedings relating to the

arbitration agreement have been commenced in the Member State at the seat of the arbitration, would definitely dispel some of the negative consequences of the West Tankers decision, such as forum shopping, parallel proceedings and conflicting decisions.[417] Furthermore, a provision stating that where the existence, validity or effects of the arbitration agreement are established, the court that stayed its proceedings shall decline jurisdiction in favour of the respective arbitral tribunal reduces the involvement of state courts in arbitral proceedings. This will give international commercial arbitration the respect it needs and deserves. Indeed, in light of the explanations above, these changes should be made as soon as possible.

Another aspect of the decision is that there seems to be no possibility to find a middle ground between the common law and the civil law approach when it comes to procedural matters, since they are simply too different. The common law countries are a minority in Europe. Therefore the European Community law is generally based on and interpreted according to the civil law approach. This must be frustrating for a country like the United Kingdom, which can look back on a long legal tradition, particularly when it has to bury one of its highly regarded legal institutes. This can lead to a general displeasure at institutions such as the EU.

Although the outcome of the decision had to be expected, the criticism of many scholars and practitioners at it was justified. Therefore, it would be the right step to implement the proposed changes of the Brussels I Regulation and the Lugano Convention[418] as soon as possible.

---

[417] See also *MV IRAN DASTGHAAYB Islamic Republic of Iran Shipping Lines v Terra-Marine SA* (19/10) [2010] ZASCA 118 (23 September) at 17 where the Supreme Court of Appeal of South Africa decided to stay the proceedings in favour of an arbitral agreement.
[418] See above s IV/1/1.4 and IV/1/1.6.

Bibliography:

Primary Sources

Cases

European Union

Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc, (C-185/07) [2009] ECR I-00663.

Gasser v MISAT (C-116/02) [2003] ECR I-14693.

Turner v Grovit, (C-159/02) [2005] ECR II 101.

Marc Rich & Co AG v Società Italiana Impianti PA (C-190/89) [1991] ECR I-3855.

Van Uden v Deco-Line Case (C-391/95) (1998) ECR I-7091.

England

Aggeliki Charis Compania Maritima SA v Pagnan SpA ("The Angelic Grace") [1995] 1 Lloyd's Rep 87.

British Airways Board v Laker Airways Ltd and Others [1984] QB 142 (CA).

British Airways Board v Laker Airways Ltd and Others [1985] AC 58 (HL).

Bushby v Munday (1821) 5 Madd 297.

Castanho v Brown and Root (UK) Ltd and Another (1980) 1 WLR 839.

Cohen v Rothfield [1919] 1 KB 410 (CA).

Continental Bank N.A. v Aeakos Compania Naviera S.A [1994] 1 WLR 588.

Dawkins v Prince Edward of Saxe Weimar (1875-1876) LR 1 QBD 499.

Deweer v Belgium (1980) 2 EHRR 439.

Donohue v Armco Inc (2002) CLC 440 (HL).

Earl of Oxford's Case (1615) 21 ER 485.

Glencore International AG v Exeter Shipping (2002) CLC 1090.

Hyman v Helm (1883) LR 24 Ch D 531 (CA).

McHenry v Lewis (1883) LR 22 Ch D 397.

Midland Bank Plc and Another v Laker Airways Ltd and Others [1986] QB 689 (CA).

National Westminster Bank Plc v Utrecht-America Finance Co (2001) 3 All ER 733 (CA).

Roger Shashoua, Rodemadan Holdings Limited, Stancroft Trust Limited v Mukesh Sharma (2009) EWHC 957.

Settlement Corp and Others v Hochschild [1966] 1 Ch 10.

Sim v Robinow (1892) 19 R 665.

Skype Technologies SA v Joltid Limited and others [2009] EWHC 2783 (Ch).

Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871 (PC).

South Carolina Insurance Co v Assurantie Maatschappij 'de Seven Provincien' NV (1987) AC 24 (HL).

Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (HL).

Turner v Grovit (2002) 1 WLR 107 (HL).

South Africa:

MV IRAN DASTGHAAYB Islamic Republic of Iran Shipping Lines v Terra-Marine SA (19/10) [2010] ZASCA 118 (23 September).

Statutes

England

Arbitration Act, 1996. Available at http://www.legislation.gov.uk/ukpga/1996/23/contents (last accessed 18 July 2011).

Senior Courts Act, 1981. Available at http://www.legislation.gov.uk/ukpga/1981/54/contents (last accessed 18 July 2011).

Supreme Court of Judicature Acts of 1873 and 1875, repealed by the Constitutional Reform Act, 2005. Available at http://www.legislation.gov.uk/ukpga/Vict/54-55/53/introduction (last accessed 18 July 2011).

Italy

Civil Code, 1942. Available at http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/codciv.htm (last acessed 17 July 2011).

Switzerland

Swiss Federal Act on Private International Law 1987 SR 291. Swiss Federal Act on Private International Law 1987 SR 291. Available at http://www.admin.ch/ch/d/sr/c291.html (last accessed 18 July 2011).

Swiss Federal Act of Civil Procedure 2008 SR 272. Available at www.admin.ch/ch/d/ff/2009/21.pdf (last accessed 18 July 2011).

Treaties and Conventions

The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 23 September 1968, as later amended by the accession conventions of 1978, 1982, 1989 and 1996 (1972) OJ L299/32 (Brussels Convention). Available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm (last accessed 14 May 2011).
Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) (2001) OJ L 12/1. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT (last accessed 13 May 2011).

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 United Nations Treaty Series Volume 330 p 3 (New York Convention). Available at http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXII-1&chapter=22&lang=en#Participants (last accessed 15 June 2011).

The Convention on jurisdiction and the enforcement of judgments in Civil and Commercial Matters 1988 SR 0.275.11 (replaced Lugano Convention). Available at http://www.bj.admin.ch/content/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugue2007/lugue1988.html (last accessed 15 June 2011).

The Convention on jurisdiction and the enforcement of judgments in Civil and Commercial Matters 2007 SR 0.275.12 (Lugano Convention). Available at http://www.bj.admin.ch/content/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugue2007.html (last accessed 15 June 2011).

Uncitral Model Law on International Commercial Arbitration (1985). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last accessed 15 June 2011).

Treaty on European Union 1992 O J C 191. Available at http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html (last accessed 13 June 2011).

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5. Available at http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (last acessed 12 August 2011).

Reports

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM (2010) 748 final. Available at http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,de&lng2=de,en,fr,&val=548494:cs&page= (last accessed 18 July 2011).

Impact Assessment Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM (2010) 1547 final (thereafter "Impact Assessment"). Available at http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf (last accessed 18 July 2011).

Schlosser P "Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice" (1979) OJ C 59/71. Available at http://aei.pitt.edu/1467/ (accessed 12 February 2011).

Evrigenis D I Kerameus K D "Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial Matters" (1986) OJ C 298/1. Available at http://aei.pitt.edu/5623/ (accessed 12 February 2011).

Secondary Sources

Books

Geimer R Schütze RA *Europäisches Zivilprozessrecht* 3ed (2010) CH Beck, Munich.

Girsberger D Voser N *International arbitration in Switzerland* (2008) Schulthess Juristische Medien, Zurich.

Kropholler J *Europäisches Zivilprozeßrecht Kommentar zu EuGVO und Lugano-Übereinkommen* 8ed (2005) Verlag Recht und Wirtschaft, Heidelberg.

Ingenhoven T *Grenzüberschreitender Rechtsschutz durch englische Gerichte: prozessuale Gestaltungsmöglichkeiten für ausländische Unternehmen im Forum London* (2001) Nomos Verlags-Gesellschaft, Baden-Baden.

Jegher G *Abwehrmassnahmen gegen ausländische Prozesse im internationalen Zivilverfahrensrecht der Schweiz* (2003), Basel.

Krause J *Anti-suit injunctions als Mittel der Jurisdiktionsabgrenzung* (2005) LIT Verlag, Münster.

Blackaby N et al *Redfern and Hunter on International Arbitration* 5ed (2009), Oxford.

Peyer PR *Vollstreckung unvertretbarer Handlungen und Unterlassungen* (2006) Schulthess Juristische Medien AG, Basel.

Raphael T *The Anti-Suit Injunction* (2008) Oxford University Press, New York.

Walter G *Internationales Zivilprozessrecht der Schweiz* 2ed (1998) UTB Verlag, Bern.

Articles

Balthasar S Richers R 'Europäisches Verfahrensrecht und das Ende der anti-suit injunction' (2009) *Heft 6 Recht der internationalen Wirtschaft* 351.

Clifford P Browne O 'Lost at sea or a storm in a tea-cup? Anti-suit injunctions after West Tankers' (2009) *12(2) International Arbitration Law Revue* 19.

Dutson S Howarth M 'After West Tankers – Rise of the "Foreign Torpedo"?' (2009) *75(3) Arbitration* 334.

Dutta A Heinze C 'Anti-suit injunctions zum Schutze von Schiedsvereinbarungen' (2007) *Heft 6 Recht der internationalen Wirtschaft* 411.

Fentimann R 'Arbitration and anti-suit injunctions in Europe' (2009) *68(2) Cambridge Law Journal* 278.

Georg JP 'International Parallel Litigation – A Survey of current Conventions and Model Laws' (2002) *37 Texas International Law Journal* 499.

Graffi LD 'Securing harmonized effects of arbitration agreements under the New York Convention' (2006) *28 Houston Journal of International Law* 663.

Hueske W 'Rule Britannia! A proposed Revival of the British Anti-suit injunction in the E.U. Legal Framework' (2009) *41 Georg Washington International Law Review* 433.

Illmer M Naumann I 'Yet another blow: Anti-suit injunctions in support of arbitration agreements within the European Union' (2007) *International Arbitration Law Review* 147.

Knowles J 'West Tankers: What It Says, What It Matters and What It Means for those Arbitrating in Europe' (2009) *14 NO 2 IBA Arbitration News* 61.

Kuipers JJ 'Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice' (2009) *10 German Law Journal* 1505.

Lehmann M 'Anti-suit injunctions zum Schutz internationaler Schiedsvereinbarungen und der EuGVOO' (2009) *62/23 Neue Juristische Wochenschrift* 1645.

Lenenbach M 'Antisuit injunctions in England, Germany and the United States: Their Treatment under European civil procedure and the Hague Convention' (1998) *20 Loyola of Los Angeles International and Comparative Law Journal* 257.

Nelson TG McInerney CP 'A Farewell to Arms? West Tankers and the Demise of the Anti-suit Injunction in Europe' (2009) *2/2 New York Dispute Resolution Lawyer 45.*

O'Gallaghan K Singh S 'Arbitration and the Brussels Regulation: Where now? (2009) *3 NO 1 Dispute Resolution International 31.*

Requejo M 'West Tankers: the Advocate General's opinion' (2008) *(E) 5/6 The European Legal Forum* 250. Available at www.simons-law.com/library/pdf/e/891.pdf (accessed 12 March 2011).

Reuland RC 'The Recognition of Judgments in the European Community: The Twentyfifth Anniversary of the Brussels Convention' *14 Michigan Journal of International Law* 559.

Santomauro P 'Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of the EC Regulation 44/2001' (2010) *6/2 Journal of Private International Law* 281.

Seriki H 'Anti-suit injunctions and the ECJ: An approach too far?' (2010) *Issue 1 Journal of Business Law* 24.

Seriki H 'Litigating in Breach of Arbitration: What exactly does Article 1(4) of the Brussels Convention cover?' (2000) *66(1) Arbitration 2000* 49.

Schlosser P 'Anti-suit injunctions zur Unterstützung von internationalen Schiedsvereinbarungen' (2006) *Heft 7 Zeitschrift für Wirtschaftsrecht 486.*

Steinbruck B 'The Impact of EU Law on Anti-suit Injunctions in Aid of English Arbitration Proceedings' (2007) *26 (Jul) Civil Justice Quarterly* 358.

Tumbridge J 'European Anti-suit injunctions in favour of Arbitration – A Sea Change?' (2010) *21(5) International Company and Commercial Law Review* 177.

Wilson ME 'Let go of that case! British anti-suit injunctions against Brussels convention members' (2003) *36 Cornell International Law Journal* 207.